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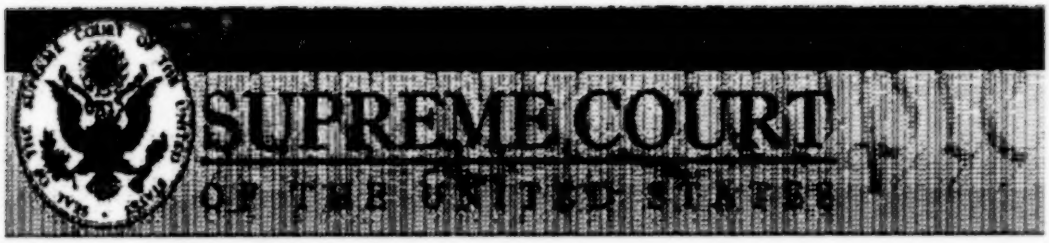

No. 13-894

Title: Department of Homeland Security, Petitioner
v.
Robert J. MacLean

Docketed: January 27, 2014

Linked with 13A503

Lower Ct: United States Court of Appeals for the Federal Circuit

Case Nos.: (2011-3231)

Decision Date: April 26, 2013

Rehearing Denied: August 30, 2013

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 18 2013	Application (13A503) to extend the time to file a petition for a writ of certiorari from November 28, 2013 to December 28, 2013, submitted to The Chief Justice.
Nov 19 2013	Application (13A503) granted by The Chief Justice extending the time to file until December 28, 2013.
Dec 17 2013	Application (13A503) to extend further the time to file a petition for a writ of certiorari from December 28, 2013 to January 27, 2014, submitted to The Chief Justice.
Dec 18 2013	Application (13A503) granted by The Chief Justice extending the time to file until January 27, 2014.
Jan 27 2014	Petition for a writ of certiorari filed. (Response due February 26, 2014)
Feb 14 2014	Order extending time to file response to petition to and including March 28, 2014.
Mar 28 2014	Brief of respondent Robert J. MacLean in opposition filed.
Apr 15 2014	Reply of petitioner Department of Homeland Security filed.
Apr 16 2014	DISTRIBUTED for Conference of May 2, 2014.
May 5 2014	DISTRIBUTED for Conference of May 15, 2014.
May 19 2014	Petition GRANTED.
May 30 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 25, 2014.
May 30 2014	The time to file respondent's brief on the merits is extended to and including September 22, 2014.
Jun 27 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Jul 25 2014	Joint appendix filed. (Statement of costs filed.)
Jul 25 2014	Brief of petitioner Department of Homeland Security filed.

Aug 19 2014	Consent to the filing of amicus curiae briefs in support of either party or of neither party from counsel for the petitioner.
Sep 4 2014	SET FOR ARGUMENT on Tuesday, November 4, 2014.
Sep 8 2014	Record requested from U.S.C.A. for the Federal Circuit.
Sep 9 2014	The Record received from U.S.C.A. Federal Circuit is electronic and located on PACER.
Sep 10 2014	Brief amicus curiae of David B. Nolan, Sr. filed. Sep 19 2014 CIRCULATED
Sep 22 2014	Brief of respondent Robert J. MacLean filed. (Distributed)
Sep 29 2014	Brief amicus curiae of United States Office of Special Counsel filed. (Distributed)
Sep 29 2014	Brief amicus curiae of American Federation of Government Employees filed. (Distributed)
Sep 29 2014	Brief amicus curiae of Former U.S. Government Officials filed. (Distributed)
Sep 29 2014	Brief amicus curiae of Rutherford Institute filed. (Distributed)
Sep 29 2014	Brief amici curiae of Blacks in Government, et al. filed. (Distributed)
Sep 29 2014	Brief amicus curiae of FlyersRights.org filed. (Distributed)
Sep 29 2014	Brief amicus curiae of Project on Government Oversight filed. (Distributed)
Sep 29 2014	Brief amici curiae of Members of Congress filed. (Distributed)
Oct 22 2014	Reply of petitioner Department of Homeland Security filed. (Distributed)
Nov 4 2014	Argued. For petitioner: Ian H. Gershengorn, Deputy Solicitor General, Department of Justice, Washington, D. C. For respondent: Neal K. Katyal, Washington, D. C.
Jan 21 2015	Adjudged to be AFFIRMED. Roberts, C. J., delivered the opinion of the Court, in which Scalia, Thomas, Ginsburg, Breyer, Alito, and Kagan, JJ., joined. Sotomayor, J., filed a dissenting opinion, in which Kennedy, J., joined.
Feb 23 2015	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

No.

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, PETITIONER

v.

ROBERT J. MACLEAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress has directed that the Transportation Security Administration "shall prescribe regulations prohibiting" the "disclosure of information obtained or developed" in carrying out certain transportation-security functions, if the agency "decides" that "disclosing the information would * * * be detrimental" to transportation security. Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101(e), 115 Stat. 603; Homeland Security Act of 2002, Pub. L No. 107-296, Tit. XVI, § 1601(b), 116 Stat. 2312. Such information is referred to in the regulations as "Sensitive Security Information." See, *e.g.*, 67 Fed. Reg. 8351 (Feb. 22, 2002).

The question presented is whether certain statutory protections codified at 5 U.S.C. 2302(b)(8)(A), which are inapplicable when an employee makes a disclosure "specifically prohibited by law," can bar an agency from taking an enforcement action against an employee who intentionally discloses Sensitive Security Information.

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In the Supreme Court of the United States

No.

DEPARTMENT OF HOMELAND SECURITY, PETITIONER

v.

ROBERT J. MACLEAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of Homeland Security, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 714 F.3d 1301. The opinions of the Merit Systems Protection Board (App., *infra*, 19a-56a, 113a-139a) are reported at 112 M.S.P.R. 4 and 116 M.S.P.R. 562. The orders of the administrative judge (App., *infra*, 57a-112a, 140a-164a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2013. A petition for rehearing was denied on August 30, 2013 (App., *infra*, 165a-166a). On November 19, 2013, the Chief Justice extended the time

within which to file a petition for a writ of certiorari to and including December 28, 2013. On December 18, 2013, the Chief Justice further extended the time to and including January 27, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App., *infra*, 167a-189a.

STATEMENT

1. Following the attacks of September 11, 2001, Congress enacted the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597, to "address the security of the nation's transportation system." H.R. Conf. Rep. No. 296, 107th Cong., 1st Sess. 54 (2001). In enacting the ATSA, Congress determined that "the best way to ensure effective Federal management of the nation's transportation system is through the creation of a new Administration" within the Department of Transportation "to be called the Transportation Security Administration (TSA)," whose responsibilities would "encompass security in all modes of transportation." *Id.* at 55; see ATSA, § 101(a), 115 Stat. 597 (49 U.S.C. 114(a)). The TSA's duties under the ATSA include daily security screening for air travel; receipt, analysis, and distribution of intelligence relating to transportation security; improvement of existing security procedures; assessment of security measures for cargo transportation; and oversight of security at airports and other transportation facilities. § 101(a), 115 Stat. 597-598 (49 U.S.C. 114(d)(1)-(2), (e)(1), (f)(1)-(3), (6)-(8) and (10)-(11)).

In addition to creating the TSA and specifying its responsibilities, the ATSA also ensured that certain

information acquired or developed in the conduct of security activities, the dissemination of which could potentially be harmful, would be shielded from public disclosure. A pre-existing statute, 49 U.S.C. 40119(b) (2000), had instructed the Federal Aviation Administration that, "notwithstanding" the Freedom of Information Act (FOIA), 5 U.S.C. 552, it was required to "prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security or research and development activities under" certain security-related provisions of Title 49, if it determined that "disclosing the information would * * * be an unwarranted invasion of personal privacy," "reveal a trade secret or privileged or confidential commercial or financial information," or "be detrimental to the safety of passengers in air transportation." See Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 1117; see also Antihijacking Act of 1974, Pub. L. No. 93-366, § 316, 88 Stat. 417. Pursuant to that congressional mandate, the Federal Aviation Administration had promulgated detailed regulations designating certain information as "Sensitive Security Information" (SSI) and restricting the dissemination of such information. See, *e.g.*, 14 C.F.R. Pt. 191 (1976); 14 C.F.R. Pt. 191 (2000). The ATSA reassigned the duty to promulgate those regulations to the TSA, § 101(e), 115 Stat. 603, and the SSI regulations were subsequently transferred over to the TSA's authority, see 67 Fed. Reg. 8351 (Feb. 22, 2002).

The Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, Tit. IV, Subtit. A, § 403(2), 116 Stat. 2178, moved the TSA into the newly created Department of Homeland Security. A separate provision of that Act, currently codified at 49 U.S.C. 114(r), expanded upon

the TSA's statutory mandate to prohibit the disclosure of sensitive information. See HSA, Tit. XVI, § 1601(b), 116 Stat. 2312; see also Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Tit. V, § 568, 121 Stat. 2092 (moving former Section 114(s) to Section 114(r)). Section 114(r)(1) provides:

> Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would—
>
> (A) be an unwarranted invasion of personal privacy;
>
> (B) reveal a trade secret or privileged or confidential commercial or financial information; or
>
> (C) be detrimental to the security of transportation.

Congress also amended Section 40119(b) itself to impose substantially similar obligations on the Secretary of Transportation. HSA, Tit. XVI, § 1601(a), 116 Stat. 2312.

In 2003, when the events giving rise to this case occurred, the TSA's SSI regulations generally defined SSI to include, *inter alia*, "[a]ny approved, accepted, or standard security program" adopted under certain regulations; "Security Directives and Information Circulars" promulgated under certain regulations; "[a]ny selection criteria used in any security screening process, including for persons, baggage, or cargo";

"[a]ny security contingency plan or information and any comments, instructions, or implementing guidance pertaining thereto"; the technical specifications of certain security equipment (such as screening equipment); and "[s]pecific details of aviation security measures, * * * includ[ing] * * * information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." 49 C.F.R. 1520.7(a)-(f) and (j) (2002); see 67 Fed. Reg. at 8340. The regulations generally prohibited the disclosure of SSI unless the recipient had a "need to know" the information, 49 C.F.R. 1520.5(a) (2002); specifically defined the circumstances in which an individual had such a "need to know," see 49 C.F.R. 1520.5(b) (2002); and stated that an unauthorized disclosure was "grounds for a civil penalty and other enforcement or corrective action." 49 C.F.R. 1520.17; see 49 C.F.R. 1520.5(d) (2002).

The TSA's current SSI regulations, as well as the SSI regulations separately promulgated by the Department of Transportation, are substantially similar (but include some new categories of SSI that have been added over the last decade). See 49 C.F.R. 1520.5, 1520.9(a)(2), 1520.17 (TSA); see also 49 C.F.R. Pt. 15 (Department of Transportation). The TSA often designates particular information as SSI without seeking to have it formally classified under the President's Article II national-security powers, in order that the information can, if necessary, be shared quickly and securely with non-government personnel (such as airport and airline employees) whose cooperation is critical to ensuring transportation security, even if those recipients are not cleared for more sensitive classified information. See, *e.g.*, 70 Fed. Reg.

1380 (Jan. 7, 2005) (stating that an "original intent" of the SSI regulations was "to share vulnerability assessments and threat information with entities in all transportation modes that need the information to help forestall future attacks"). Since 2009, Section 114(r) has made clear that "[n]othing in this subsection, or any other provision of law, shall be construed to authorize the designation of information as sensitive security information" in order to "conceal a violation of law, inefficiency, or administrative error"; "prevent embarrassment to a person, organization, or agency"; "restrain competition"; or "prevent or delay the release of information that does not require protection in the interest of transportation security, including basic scientific research information not clearly related to transportation security." 49 U.S.C. 114(r)(4)(A)-(D); see American Communities' Right to Public Information Act, Pub. L. No. 111-83, § 561(c)(1), 123 Stat. 2182 (2009); see also 49 U.S.C. 40119(b) (similar limitations on the Department of Transportation's authority).

2. Respondent is a former federal air marshal who was hired by the TSA in 2001. App., *infra*, 2a. Under the federal air marshal program, which was established by the ATSA, the TSA stations federal air marshals on passenger flights in order to protect those flights from high security risks. 49 U.S.C. 44917(a)(1)-(2); see ATSA, § 105(a), 115 Stat. 606. The TSA has discretionary authority to deploy federal air marshals on any flight, and it is required to station a federal air marshal on any flight that, in the agency's judgment, "present[s] high security risks." 49 U.S.C. 44917(a)(1)-(2); see ATSA, § 105(a), 115 Stat. 606.

In 2003, the TSA briefed respondent on a "potential plot" to hijack United States airliners. App., *infra*, 2a (citation omitted). Shortly thereafter, he received a text message from the TSA stating that, for a particular window of time, the TSA would not be deploying federal air marshals on overnight missions from Las Vegas. *Ibid.*; *id.* at 21a n.1. Respondent informed both his supervisor and the Office of the Inspector General for the Department of Homeland Security of his personal view that the TSA's decision about how to deploy its air marshals was not in the best interests of public safety, but he was not satisfied with the responses he received. *Id.* at 21a-22a.

Respondent then decided to reveal the TSA's deployment plans to the news media, in an effort to "create a controversy" that would force the TSA to change them. App., *infra*, 2a (citation omitted). He told an MSNBC reporter about the TSA's plans, and the reporter published an article exposing those plans to the public and criticizing them. *Ibid.* Members of Congress and others criticized the plans. *Ibid.* The TSA ultimately did not follow the course of action that had been outlined in the original text message. *Ibid.*

The TSA was not aware initially that respondent had been the source of the disclosure. App., *infra*, 2a. It learned of his involvement, however, when respondent appeared on the NBC Nightly News to discuss a separate incident, in a disguise that proved to be inadequate. *Ibid.* The TSA removed respondent from his position as a federal air marshal for disclosing SSI without authorization. *Ibid.*

3. Respondent challenged his removal before the Merit Systems Protection Board (MSPB), "an independent Government agency that operates like a

court" and has jurisdiction to review certain personnel actions. 5 C.F.R. 1200.1; see, *e.g.*, 5 U.S.C. 7513(d). One of respondent's claims was that his removal had violated 5 U.S.C. 2302(b)(8)(A). App., *infra*, 3a. Under Section 2302(b)(8)(A), an agency generally cannot "take * * * a personnel action" against an employee for disclosing certain types of information, when the employee "reasonably believe[d]" that the information showed a "violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. 2302(b)(8)(A)(i) and (ii). Section 2302(b)(8)(A) does not apply, however, if the employee's disclosure was "specifically prohibited by law."

The MSPB ultimately rejected respondent's Section 2302(b)(8)(A) argument and sustained the agency's decision to remove him. App, *infra*, 19a-56a. The MSPB recognized that the TSA, pursuant to a legislative mandate to prescribe regulations preventing the disclosure of certain types of information, had promulgated regulations that "identified SSI subject to * * * statutory nondisclosure as including information relating to [federal-air-marshal] deployments." *Id.* at 33a.* It additionally observed that the Ninth

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* In the MSPB's view, the relevant legislative mandate was the version of 49 U.S.C. 40119(b) that was in effect when the TSA initially promulgated the regulations. App., *infra*, 33a n.9. The briefs and decisions in this case have accordingly focused on Section 40119(b). However, at the time of respondent's disclosure, the statute requiring and authorizing the TSA's SSI regulations was actually the provision now codified in Section 114(r). See pp. 4-5, *supra*. For that reason, and for the sake of simplicity, this petition will focus on Section 114(r). In any event, because the language of

Circuit, in a separate proceeding that respondent had initiated, had "unequivocally declared that the information disclosed by [him] constituted SSI as defined in those regulations." *Ibid.*; see *MacLean* v. *Department of Homeland Sec.*, 543 F.3d 1145, 1150 (2008); 49 C.F.R. 1520.7(j) (2002) (defining SSI to include "information concerning specific numbers of Federal Air Marshals, deployments or missions"). The MSPB accordingly reasoned that because respondent had "disclosed information that is specifically prohibited from disclosure by a regulation promulgated pursuant to an express legislative directive from Congress to TSA," the "disclosure was 'specifically prohibited by law'" for purposes of Section 2302(b)(8)(A). App., *infra*, 34a-35a.

4. The Federal Circuit vacated the MSPB's decision and remanded for further proceedings. App., *infra*, 1a-18a; see 5 U.S.C. 7703(a)(1) (authorizing an employee to seek Federal Circuit review of an adverse MSPB decision). The court of appeals recognized that respondent's removal had reflected a proper application of the TSA's regulations. App., *infra*, 5a-7a. It also recognized that removal had been a reasonable penalty for a disclosure that had "compromised flight safety" and "could have had catastrophic consequences." *Id.* at 7a-9a. The court concluded, however, that respondent's disclosure had not been "specifically prohibited by law" and that he was therefore entitled to invoke the protections of Section 2302(b)(8)(A). *Id.* at 10a-17a.

In reaching that conclusion, the court of appeals focused on the text of the statute requiring the promul-

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the two statutes is nearly identical, the legal analysis would be the same under either one.

gation of the SSI regulations, rather than on the regulations themselves. App., *infra*, 10a-17a. In the court's view, the parties were in agreement that "in order to fall under the * * * 'specifically prohibited by law' proviso," a "disclosure must be prohibited by a statute rather than by a regulation." *Id.* at 12a; see *id.* at 13a (perceiving the parties to agree that "a regulation * * * cannot be 'law'"). The court also relied on a Senate Report addressing an unenacted version of Section 2302(b)(8) that contained the phrase "prohibited by statute" rather than the phrase "specifically prohibited by law." *Id.* at 13a-14a (citing S. Rep. No. 969, 95th Cong., 2d Sess. 21 (1978) (Senate Report)); see Senate Report 154.

The court of appeals ultimately acknowledged, however, that "[r]egulations promulgated pursuant to Congress's express instructions *would* qualify as specific legal prohibitions." App., *infra*, 15a (emphasis added). And it viewed the legislative mandate to promulgate SSI regulations to present "a very close case," because the mandate included a direct "charge" to the agency "to prescribe regulations pursuant to specific criteria (i.e., only information that would be detrimental to transportation safety)." *Ibid.* But the court nevertheless concluded that, because the statute "gives some discretion to the Agency to fashion regulations for prohibiting disclosure," the statute's criteria were too "general" to "'specifically prohibit' employee conduct." *Id.* at 14a.

Having decided the critical legal question, the court of appeals remanded the case for a determination whether respondent had reasonably believed his disclosure evidenced "a substantial and specific danger to public health or safety" or one of the other subjects

listed in Section 2302(b)(8)(A). App., *infra*, 16a. Judge Wallach concurred to express the view that "the facts alleged, if proven, allege conduct at the core of" the activity protected by that provision. *Id.* at 18a. The court of appeals denied the government's petition for rehearing en banc. *Id.* at 165a-166a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision seriously undermines the effectiveness of the congressionally mandated SSI regime, invites individual federal employees to make disclosures that will threaten public safety, and warrants this Court's immediate review. In the course of its efforts to secure the Nation's transportation network, the TSA necessarily develops and acquires a great deal of information, including information about security vulnerabilities, that has the potential to cause extreme harm if publicly disclosed. In recognition of that fact, Congress directed that the TSA "shall prescribe regulations" prohibiting disclosures that would, in the expert judgment of the TSA, "be detrimental to the security of transportation." 49 U.S.C. 114(r)(1)(C). The decision in this case, however, effectively permits individual federal employees to override the TSA's judgments about the dangers of public disclosure.

According to the court of appeals, no matter how harmful it might be for particular SSI to fall into the wrong hands, an employee cannot be disciplined for publicizing that SSI, so long as he reasonably believes that the disclosure serves one of the interests listed in 5 U.S.C. 2302(b)(8)(A). The decision below thus clears a path for any employee to do what respondent did here: go public with an internal disagreement about how best to allocate finite security resources; put lives

in danger by identifying the areas that have received fewer resources; and then attempt to avoid any employment-related repercussions by claiming that publicizing such vulnerabilities revealed "a substantial and specific danger to public health or safety," 5 U.S.C. 2302(b)(8)(A)(ii).

That result contravenes the manifest intent of Congress. The protections of Section 2302(b)(8)(A) expressly do not apply to disclosures that are "specifically prohibited by law." That proviso squarely encompasses disclosures of SSI, which have been prohibited pursuant to an express congressional directive. Employees can instead raise concerns that implicate SSI through a separate set of procedures, covered by Section 2302(b)(8)(B), that allow such concerns to be addressed without harmful public disclosures. This Court should grant certiorari and reverse.

A. The Disclosure Of Sensitive Security Information Is "Specifically Prohibited By Law" Within The Meaning Of 5 U.S.C. 2302(b)(8)(A)

The Federal Circuit erred in permitting respondent to invoke 5 U.S.C. 2302(b)(8)(A) as a defense to his removal. Section 2302(b)(8)(A) does not apply when an employee has revealed information the disclosure of which is "specifically prohibited by law." 5 U.S.C. 2302(b)(8)(A). Respondent's disclosure here falls squarely within that proviso.

1. The TSA had at the time of respondent's disclosure and has today a statutory obligation to promulgate regulations "prohibiting * * * disclosure[s] of information" that would, in the TSA's judgment, "be detrimental to the security of transportation." HSA, Tit. XVI, § 1601(b), 116 Stat. 2312; see 49 U.S.C. 114(r). Consistent with that statutory obligation, the

TSA has promulgated detailed regulations restricting the dissemination of SSI. 67 Fed. Reg. 8351 (Feb. 22, 2002). Those regulations expressly foreclosed respondent from sharing "information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations" with unauthorized persons. 49 C.F.R. 1520.7(j) (2002); see 49 C.F.R. 1520.5(a) (2002); see also App., *infra*, 5a-7a (concluding that respondent violated a nondisclosure prohibition); *MacLean* v. *Department of Homeland Sec.*, 543 F.3d 1145, 1150 (9th Cir. 2008) (same). Respondent's disclosure of air-marshal-deployment information was thus "specifically prohibited by law" within the meaning of Section 2302(b)(8)(A).

The regulatory prohibition that respondent violated in this case is not meaningfully distinguishable from other legal prohibitions that, even in the court of appeals' view, would be sufficient to render Section 2302(b)(8)(A) inapplicable. The court of appeals accepted, for example, that the "specifically prohibited by law" proviso would be satisfied by the Trade Secrets Act, 18 U.S.C. 1905. See App., *infra*, 14a-15a. That Act prohibits the disclosure of information that "concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association." 18 U.S.C. 1905. A bar on disclosing information about the "operations" of a "corporation," *ibid.*, is no more specifically prohibitory than a bar on disclosing information about "specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations," 49 C.F.R. 1520.7(j)

(2002). Indeed, it is difficult to see how the provisions that respondent violated in this case could have prohibited the disclosure of air-marshal-deployment information with any greater clarity or specificity.

The prohibition against respondent's disclosure was a prohibition "by law" whether it appeared directly in the statute or instead in the regulations that the statute required the TSA to promulgate. As Congress presumably understood, the term "law" is not limited to congressional enactments. In *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), for example, this Court construed the phrase "authorized by law" to include not just authorization conferred by statute, but also by "properly promulgated, substantive agency regulations." *Id.* at 295. The Court observed that such regulations "have the 'force and effect of law'" and that, in the absence of a "clear showing of contrary legislative intent," the "traditional understanding" of the phrase "'authorized by law'" would presumptively include them. *Id.* at 295-296 (citation omitted).

In the context of Section 2302(b)(8)(A)'s "specifically prohibited by law" proviso, the "traditional understanding" of the word "law" would include, at a minimum, substantive nondisclosure regulations, like the SSI regulations, that were enacted pursuant to an express congressional directive. See *Chrysler Corp.*, 441 U.S. at 308 (concluding that the phrase "authorized by law" would be satisfied by a procedurally valid authorizing regulation enacted pursuant to a statute that "contemplates the regulations issued"). And nothing in Section 2302(b)(8)(A)'s history provides a "clear showing of contrary legislative intent," *id.* at 296, that would justify disregarding that traditional understanding. Indeed, the history shows that Con-

gress specifically decided not to adopt a proposal by the Senate that would have used the word "statute" rather than the word "law." See Senate Report 154; H.R. Conf. Rep. No. 1717, 95th Cong., 2d. Sess. 130 (1978) (Conference Report).

The government has not disputed, for purposes of this case, that *some* regulatory prohibitions could fall outside the reach of Section 2302(b)(8)(A)'s "specifically prohibited by law" proviso. See Gov't C.A. Br. 46. The conference report accompanying the proviso's enactment states that the proviso "does not refer to agency rules and regulations" but instead "to statutory law and court interpretations of those statutes." Conference Report 130. The phrase "agency rules and regulations," however, cannot be taken to encompass congressionally mandated regulations like the ones at issue here. As the court of appeals recognized (App., *infra*, 14a), Congress was apparently concerned with the possibility that agencies might adopt "*internal procedural* regulations against disclosure" that would "discourage an employee from coming forward with allegations of wrongdoing." Senate Report 21 (emphasis added). That concern would not apply to nondisclosure regulations that Congress *itself* expressly instructed the agency to promulgate. Such regulations "implement the statute," *Chrysler Corp.*, 441 U.S. at 302-303 (citation omitted), and thus would have been considered by Congress to be part of "statutory law" for Section 2302(b)(8)(A) purposes.

To the extent the Federal Circuit believed that the government waived the argument that the regulations in this case can be "law" for purposes of the Section 2302(b)(8)(A) proviso, that belief was incorrect. The government's argument in the court of appeals did

focus principally on the statute as the relevant source of "law." See, *e.g.*, Gov't C.A. Br. 45 (explaining that the MSPB had held that "the 'law' that specifically prohibits the disclosure of SSI is the statute passed by Congress"); *id.* at 46-47 (agreeing that the proviso applies only when Congress has "explicitly prohibited" a particular disclosure "via legislative enactment" and characterizing the dispute as "whether 49 U.S.C. § 40119 serves as that legislative enactment") (internal quotation marks and citation omitted). But the government also expressly defended the proposition that "when an agency has adopted non-disclosure regulations pursuant to a specific Congressional mandate to do so, the agency may discipline the employee who violates that non-disclosure regulation." *Id.* at 48; see, *e.g.*, *id.* at 45 (arguing that the disclosure of SSI "was both 'specifically prohibited by' 49 U.S.C. § 40119, *as well as by the TSA regulation*") (emphasis added); *id.* at 46 (describing the MSPB's decision, which the government was defending, as "encompass[ing] regulations * * * to the extent that those regulations implement a specific statutory requirement that an agency describe the information that must be protected"). And the court of appeals itself acknowledged that "[r]egulations promulgated pursuant to Congress's express instructions would qualify as specific legal prohibitions." App., *infra*, 15a. It erred in failing to apply that principle to the regulations here.

2. Even if the relevant inquiry were restricted to the four corners of the statute, the disclosure in this case would still have been "specifically prohibited by law" within the meaning of Section 2302(b)(8)(A). Section 114(r) sets forth three "specific[]" categories

of information: information whose disclosure, in the TSA's judgment, would "be an unwarranted invasion of personal privacy"; information whose disclosure, in the TSA's judgment, would "reveal a trade secret or privileged or confidential commercial or financial information"; and information whose disclosure would, in the TSA's judgment, "be detrimental to the security of transportation." 49 U.S.C. 114(r)(1)(A)-(C). And Section 114(r) "prohibit[s]" the disclosure of that information by providing that the TSA "shall prescribe regulations" to that effect. 49 U.S.C. 114(r)(1).

The Federal Circuit's view (App., *infra*, 14a) that the statute "does not 'specifically prohibit'" disclosures because it "provides only general criteria for withholding information and gives some discretion to the Agency" cannot be squared with this Court's decision in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975). That case involved a provision of the FOIA, known as Exemption 3, which at that time permitted an agency to withhold from the public any information "specifically exempted from disclosure by statute." *Id.* at 257 (quoting 5 U.S.C. 552(b)(3) (1970)). The Court construed Exemption 3 to apply even in circumstances where an agency's discretionary decision was a prerequisite to nondisclosure. *Id.* at 261-267; see *id.* at 258 n.4. In particular, the Court found the provision applicable to information that became nondisclosable only after the relevant agency had made a "judgment" that disclosure was "not required in the interest of the public" and "would adversely affect the interests" of someone objecting to the disclosure. *Id.* at 258 n.4 (quoting 49 U.S.C. 1504 (1970)). The proviso at issue here ("specifically prohibited by law") is at least as broad as the proviso at issue in

Robertson ("specifically exempted from disclosure by statute"); the degree of agency discretion here is, if anything, narrower than the degree of agency discretion in *Robertson*; and the applicability of the proviso here thus follows *a fortiori* from *Robertson*.

In the wake of *Robertson*, Congress narrowed the language of FOIA's Exemption 3 to apply only to information "specifically exempted from disclosure by statute (other than section 552b of this title), *provided that* such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. 552(b)(3) (1976) (emphasis added); see *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 121 n.18 (1980). But when Congress enacted Section 2302(b)(8)(A) shortly thereafter, it included a "specifically prohibited by law" proviso that was not subject to any such limitations. See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1116. The natural inference is that Congress intended the "specifically prohibited by law" proviso in Section 2302(b)(8)(A) to be interpreted at least as broadly as the "specifically exempted from disclosure by statute" proviso at issue in *Robertson*. See, *e.g.*, *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 559 U.S. 573, 589-590 (2010) ("We have often observed that when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'") (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998)).

The legislative history of Section 2302(b)(8)(A) supports that inference. As noted above, the Senate proposed a version of the proviso that would have applied only to disclosures "prohibited by statute." Senate Report 154. The Senate Report accompanying that proposal expressed the view that the proviso should be limited to the types of statutes covered by the amended Exemption 3. *Id.* at 21. But Congress rejected the Senate's proposal in favor of the language proposed by the House, which used the phrase "specifically prohibited by law." H. Rep. No. 1403, 95th Cong., 2d Sess. 126 (1978); Conference Report 130. Even if adoption of the Senate version would have implied the existence of the various nontextual limitations to which the Senate Report referred, rejection of the Senate's version implies the opposite.

In any event, assuming *arguendo* that the Section 2302(b)(8)(A) proviso did incorporate those implicit limitations, the legislative mandate to promulgate the SSI regulations would satisfy them. Even under the Senate Report's restrictive view, "a statute which establishes particular criteria for withholding or refers to particular types of matters to be withheld" would be sufficient to render Section 2302(b)(8)(A) inapplicable. Senate Report 21. The legislative mandate here, which describes specific categories of information that the TSA is required to keep confidential, "refers to particular types of matters to be withheld." And it compares favorably in those respects with a statute that the Senate Report specifically identified as one that would satisfy the proviso, "section 102(d)(3) of the National Security Act of 1947." *Id.* at 21-22; see *CIA* v. *Sims*, 471 U.S. 159, 167-168 (1985) (agreeing with the "uniform view among other

federal courts" that Section 102(d)(3) is "a withholding statute under Exemption 3"). Section 102(d)(3) provided that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." 50 U.S.C. 403(d)(3) (1976). The legislative mandate here—which expressly directs the TSA to prohibit the disclosure of three particular categories of information in a particular manner (promulgation of regulations)—is no less specific or prohibitory.

3. The Federal Circuit's conclusion that respondent can invoke the protections of Section 2302(b)(8)(A) undermines the careful line that Congress drew between concerns that an employee may air in public and those that he may not. The general purpose of Section 2302(b)(8) is to "encourage government personnel to blow the whistle on wasteful, corrupt or illegal government practices without fearing retaliatory action by their supervisors or those harmed by the disclosures." *Marano* v. *Department of Justice*, 2 F.3d 1137, 1142 (Fed. Cir. 1993). But that general purpose is limited by a countervailing concern that employees not publicly reveal information that has legitimately been shielded from public view for reasons unrelated to whistleblowing.

Under Section 2302(b)(8), any employee who comes across information that he "reasonably believes" shows a "violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" can raise his concerns without fear of employment-related reprisal. 5 U.S.C. 2302(b)(8)(A)(i) and (ii), (B)(i) and (ii). But the manner in which he may raise those concerns depends

upon whether the disclosure of information is "specifically prohibited by law" (or "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs"). 5 U.S.C. 2302(b)(8)(A). If no such prohibition exists, then there is no reason to believe that any harm to the public interest caused by public disclosure will be significant enough to outweigh the benefits of public debate, and the employee may go public with the information. See *ibid.*

If such a prohibition does exist, however, Section 2302(b)(8) does not permit the employee himself to decide whether the benefits of public disclosure outweigh the interests animating the prohibition against it. Instead, the employee must raise his concerns through internal channels: he may go either "to the Inspector General of [the] agency or another employee designated by the head of the agency to receive such disclosures" or "to the Special Counsel," who operates independently of the agency. 5 U.S.C. 2302(b)(8)(B); see 5 U.S.C. 1211-1212. Those channels provide substantial procedures for the exposure of problems within an agency that warrant corrective action, while at the same time respecting the need to shield particular information from public view.

If, for example, the employee goes to the Special Counsel, the Special Counsel is required to evaluate the information within 15 days, 5 U.S.C. 1213(b); may compel the agency to investigate the matter and file a written report, 5 U.S.C. 1213(c)-(d); and must transmit the report (generally along with any comments from the employee whose disclosure initiated the investigation) to the President, relevant congressional committees, and, potentially, other agencies (such as

the Department of Justice), 5 U.S.C. 1213(e). Under the Federal Circuit's decision, however, an employee may disregard those procedures and individually choose to make public disclosures that the TSA has legitimately determined, in response to a congressional directive, to "be detrimental to the security of transportation." 49 U.S.C. 114(r)(1)(C). The Federal Circuit's decision is erroneous and should be reversed.

B. The Federal Circuit's Erroneous Decision Warrants Immediate Review

1. The court of appeals' decision creates grave public-safety concerns that warrant this Court's immediate intervention. The court's holding that an employee who discloses SSI may invoke Section 2302(b)(8)(A) as a defense to a resulting employment action will embolden federal employees to disclose SSI. The TSA estimates that it has more than 65,000 employees with access to SSI. Disclosures by such employees will, as judged by the expert agency designated by Congress for the task, be "detrimental to the security of transportation," 49 U.S.C. 114(r)(1)(C), and create serious risks to transportation safety.

Information classified as SSI includes "[s]ecurity programs and contingency plans"; "[s]ecurity [d]irectives"; specifications of security equipment and procedures; "[v]ulnerability assessments"; methods used to detect threats; operational and technical details of particular security measures; security screening procedures; "[s]ecurity training materials"; "[i]dentifying information of certain transportation security personnel"; and lists of systems and assets "the incapacity or destruction of [which] would have a debilitating impact on transportation security." 49 C.F.R. 1520.5(b)(1)-(2), (4)-(5) and (7)-(12) (emphasis omitted).

Any of that information, if improperly disclosed, could present a serious threat to the security of the Nation's transportation network and put lives at risk.

Armed with such information, someone might, for example, gain the ability to circumvent existing security measures, evade existing threat-detection procedures, or pinpoint specific vulnerabilities in the national transportation network. As the Federal Circuit recognized, respondent's own disclosure of flights that would not be protected by federal air marshals "compromised flight safety," created a "threat to public safety," and "could have had catastrophic consequences." App., *infra*, 8a. Even information that might not appear on its face to expose a security vulnerability (say, the fact that a particular federal air marshal will be on a particular flight) could potentially be exploited to create one (say, by interfering with the air marshal's ability to make the flight). It will not always be possible, as it was in this case, for the TSA to shift its plans in time to eliminate the disclosed vulnerability. Even when it is possible to do so, the effort may, as in this case, "force[] the Agency to reallocate scarce resources," *ibid.*, thereby diminishing the resources available in areas that the agency initially determined to be more critical. And a disclosure of information about screening technology, for example, would require major investments of time, resources, and infrastructure improvements to remedy; could take months, if not years, to complete; and would require considerable expenditure of federal funds.

The Federal Circuit attempted to downplay the impact of its decision by pointing out that the government may still "discipline employees who reveal SSI for personal gain or due to negligence, or who disclose

information that the employee does not reasonably believe evidences a substantial and specific danger to public health or safety." App., *infra*, 16a-17a. But that is cold comfort. SSI, by its very nature, concerns security matters. Employees will thus frequently be able to claim that they are publicly disclosing SSI in an effort to expose flaws in transportation security. Many of those employees may later be deemed by the MSPB, or a court, to have had a "reasonabl[e] belie[f]" that the disclosure "evidences * * * a substantial and specific danger to public health or safety," 5 U.S.C. 2302(b)(8)(A)(ii), or another type of "reasonabl[e] belie[f]" that qualifies for protection under Section 2302(b)(8)(A). Even if some of those employees' claims are not ultimately deemed to be within the scope of Section 2302(b)(8)(A), the increased likelihood of that result will itself erode the SSI scheme's deterrent effect and encourage more disclosures, which are immediately harmful whether or not the responsible employee is ultimately subject to disciplinary action.

2. Certiorari is warranted notwithstanding the absence of a circuit conflict on the question presented. The Federal Circuit has outsized influence in this area, and the potential for a circuit conflict ever to develop is more theoretical than real.

An employee's challenge to a personnel action under Section 2302(b)(8)(A) is generally channeled to the MSPB. See, *e.g.*, 5 U.S.C. 7513(d) (MSPB jurisdiction over appeals of adverse actions against covered employees); 5 U.S.C. 1214(a)(3) (MSPB jurisdiction to hear Section 2302(b)(8) claims that the Special Counsel terminates or does not timely act upon). The MSPB has generally viewed Federal Circuit prece-

dent to be controlling. See, *e.g.*, *Garcia* v. *Department of Agric.*, 110 M.S.P.R. 371, 379-380 (2009). And, except in cases involving antidiscrimination claims, MSPB decisions have historically been reviewable only in the Federal Circuit. See 5 U.S.C. 7703(b)(1) (2006).

In the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, Tit. I, § 108, 126 Stat. 1469-1470, Congress established a two-year window (which expires at the end of 2014) during which certain Section 2302(b)(8) cases can be appealed not only to the Federal Circuit, but to "any court of appeals of competent jurisdiction." 5 U.S.C. 7703(b)(1)(B). In light of that temporary provision, the MSPB has relaxed its view that Federal Circuit precedent is necessarily controlling in such cases. See *Day* v. *Department of Homeland Sec.*, 119 M.S.P.R. 589, 595 n.5 (2013) (declining to follow a Federal Circuit decision that represented a "minority approach among the courts of appeal"). But the government is unaware of any case involving the question presented that is on track to be decided before the two-year window expires. In any event, even during the two-year window, an employee could still elect to appeal any MSPB decision in the government's favor to the Federal Circuit, which will then be bound by the decision in this case. See App., *infra*, 165a-166a (denying rehearing en banc); 5 U.S.C. 7703(b)(1)(B).

It is, moreover, unlikely that another good vehicle for addressing the question presented will arise, because the Federal Circuit's decision will deter federal officials in the future from attempting to discipline an employee who discloses SSI and appears to have a colorable Section 2302(b)(8)(A) defense. Under 5

U.S.C. 1215(a), the independent Special Counsel is empowered to bring a case before the MSPB seeking *personal* sanctions against any agency official who takes action against an employee in violation of Section 2302(b)(8). The potential sanctions include removal of the official, debarment from federal employment, and monetary penalties up to $1000. 5 U.S.C. 1215(a)(3)(A)(i) and (ii). A federal official is unlikely to risk such personal repercussions simply to provide another vehicle for this Court's review. As a result, future SSI disclosures may go unchecked (and thus would not generate litigation). And even assuming the government could raise the question presented again at a later date, the delay would provide additional opportunity for harmful disclosures that could endanger public safety. This Court should accordingly grant certiorari now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2014

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2011-3231

ROBERT J. MACLEAN, PETITIONER

v.

DEPARTMENT OF HOMELAND SECURITY, RESPONDENT

OPINION

Apr. 26, 2013

Before: PROST, MOORE, and WALLACH, Circuit Judges.

Opinion for the court filed by Circuit Judge MOORE. Concurring opinion filed by Circuit Judge WALLACH.

MOORE, Circuit Judge.

Robert J. MacLean petitions for review of a final decision of the Merit Systems Protection Board (Board), which sustained the Transportation Security Administration's (Agency's) removal of Mr. MacLean from the position of Federal Air Marshal (Marshal). *See MacLean v. Dep't of Homeland Sec.*, 116 M.S.P.R. 562 (2011) (*MacLean II*). Because the Board incor-

rectly interpreted the Whistleblower Protection Act (WPA), we *vacate* and *remand*.

BACKGROUND

Mr. MacLean became a Marshal in 2001. In July 2003, all Marshals received a briefing from the Agency that there was a "'potential plot' to hijack U.S. Airliners." *MacLean II*, 116 M.S.P.R. at 564. Soon after that briefing, however, the Agency sent an unencrypted text message to the Marshals' cell phones cancelling all missions on flights from Las Vegas until early August. After receiving this directive, Mr. MacLean became concerned that "suspension of overnight missions during a hijacking alert created a danger to the flying public." *Id.* He complained to his supervisor and to the Office of Inspector General, but they responded that nothing could be done. J.A. 212-13. Dissatisfied, Mr. MacLean told an MSNBC reporter about the directive so as to "create a controversy resulting in [its] rescission." *MacLean II*, 116 M.S.P.R. at 565. MSNBC published an article criticizing the directive, and the Agency withdrew it after several members of Congress joined in the criticism.

In 2004, Mr. MacLean appeared on NBC Nightly News in disguise to criticize the Agency dress code, which he believed allowed Marshals to be easily identified. However, someone from the Agency recognized his voice. During the Agency's subsequent investigation, Mr. MacLean admitted that he revealed the cancellation directive to an MSNBC reporter in 2003. Eventually, Mr. MacLean was removed from his position because his contact with the MSNBC reporter

constituted an unauthorized disclosure of sensitive security information (SSI). Although the Agency had not initially labeled the text message as SSI when it was sent, it subsequently issued an order stating that its content was SSI.

Mr. MacLean challenged the SSI order in the Ninth Circuit as a violation of the Agency's own regulations and as an impermissible retroactive action, but the court rejected Mr. MacLean's challenges. *MacLean v. Dep't of Homeland Sec.*, 543 F.3d 1145, 1150-52 (9th Cir. 2008). It held that substantial evidence supported designating the text message as SSI under the applicable regulations, *id.* at 1150, and that the Agency did not engage in retroactive action because it "applied regulations . . . in force in 2003" to determine that the text message was SSI, *id.* at 1152.

Mr. MacLean challenged his removal before the Board, arguing that his disclosure of the text message was protected whistleblowing activity. After an interlocutory appeal from the Administrative Judge (AJ), the full Board determined that Mr. MacLean's disclosure fell outside the WPA because it was "specifically prohibited by law." 5 U.S.C. § 2302(b)(8)(A) (2008). The Board reasoned that the regulation prohibiting disclosure of SSI, upon which the Agency relied when it removed Mr. MacLean, had the force of law. *MacLean v. Dep't of Homeland Sec.*, 112 M.S.P.R. 4, 12-18 (2009) (*MacLean I*).

The AJ then upheld Mr. MacLean's removal and the Board affirmed in *MacLean II*, the decision now on appeal. Reconsidering *MacLean I*, the Board ex-

plained that a regulation is not a "law" within the meaning of the WPA. Instead, the Board held that the disclosure of the text message could not qualify for WPA protection because it was directly prohibited by a *statute*, the Aviation and Transportation Security Act (ATSA). *MacLean II*, 116 M.S.P.R. at 570-71.

The Board also determined that the AJ applied the correct regulation in upholding the Agency's removal of Mr. MacLean, and that the penalty of removal was reasonable. Moreover, the Board upheld the AJ's finding that the Agency did not terminate Mr. MacLean in retaliation for his activities on behalf of the Federal Law Enforcement Officers Association (FLEOA) because the unauthorized disclosure of SSI was a non-retaliatory reason for removal. Therefore, the Board sustained the removal.

This appeal followed. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

DISCUSSION

We must affirm the Board's decision unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c) (2012). We review the Board's legal determinations *de novo*. *Welshans v. U.S. Postal Serv.*, 550 F.3d 1100, 1102 (Fed. Cir. 2008).

I. Application of Agency Regulations to Mr. MacLean's Removal

The Board explained that, "[u]nder the regulations in effect in July 2003, information relating to the deployment of [Marshals] was included within the definition of SSI," and concluded that, as a result, Mr. MacLean's communication with a reporter constituted an unauthorized disclosure. *MacLean II*, 116 M.S.P.R. at 569. Mr. MacLean argues, however, that the Board erred by upholding his removal because he was not charged under the right regulation. He explains that the regulation quoted in the initial charge, 49 C.F.R. § 1520.5(b)(8)(ii), was not in force in 2003 and only became codified in 2005. Mr. MacLean contends that the Board wrongly concluded that the regulation it ultimately relied on to uphold his removal, 49 C.F.R. § 1520.7(j), which *was* in force in 2003, is the same as the 2005 regulation. Mr. MacLean argues that the Board violated the rule of *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S. Ct. 454, 87 L. Ed. 626 (1943), because the Board affirmed his removal on grounds different from those under which he was initially charged by the deciding official.

Mr. MacLean also maintains that, although the Ninth Circuit upheld the Agency's eventual designation of the text message as SSI, his removal violated his due process rights because the message was not labeled SSI when it was sent. He argues that the termination was improper because he did not know that he was violating any Agency rules by revealing the content of the text message. Mr. MacLean admits that

he signed a nondisclosure agreement as a condition of his employment, which states that Marshals "may be removed" for "[u]nauthorized release of security-sensitive or classified information." *MacLean II*, 116 M.S.P.R. at 580. He argues, however, that he believed that the message was not SSI and that, in any event, he was protected as a whistleblower. Repeating the argument rejected by the Board, Mr. MacLean thus insists that he tried in good faith to proceed within the law.

We do not find Mr. MacLean's arguments challenging the Agency's charge to be persuasive. The regulation that the Board ultimately relied upon to uphold Mr. MacLean's removal, 49 C.F.R. § 1520.7(j) (2002), is no different from the regulation under which he was initially charged, 49 C.F.R. § 1520.5(b)(8)(ii) (2005). The earlier regulation bars disclosing "[s]pecific details of aviation security measures," including "infor-mation concerning specific numbers of [Marshals], deployments or missions," while the latter prohibits revealing "specific details of aviation . . . security measures" and "[i]nformation concerning deployments." In fact, the regulation's history shows that § 1520.5(b)(8)(ii) is simply a recodified version § 1520.7(j). *See* J.A. 36. Because the Agency removed Mr. MacLean for revealing SSI, and the Board affirmed the termination for that same reason, the Board did not violate the *Chenery* doctrine.

We likewise reject Mr. MacLean's due process and "good faith" arguments. Both the applicable regulation and the nondisclosure agreement that Mr. Mac-

Lean signed put him on notice that revealing information concerning coverage of flights by Marshals could lead to termination. Thus, the Agency did not violate due process even though it formally designated the text message as SSI only after it was sent. Furthermore, we agree with the government that, because the regulation prohibiting disclosure of SSI does not include an intent element, Mr. MacLean cannot be exonerated by his subjective belief that the content of the text message was not SSI or that he was protected as a whistleblower.

II. Reasonableness of Mr. MacLean's Removal

Mr. MacLean argues that the Board failed to adequately analyze the factors listed in *Douglas v. Veterans Administration*, 5 MSPB 313, 5 M.S.P.R. 280, 305-06 (1981), for possible mitigation of the penalty of removal. Mr. MacLean contends that the Board did not take into account the fact that he was a one-time offender and otherwise had an unblemished record. Mr. MacLean also argues that *Douglas's* "comparative discipline" factor did not weigh in favor of removal because other Marshals were not terminated even though they disclosed SSI regarding specific flights. Mr. MacLean contends that the Board ignored the fact that other Marshals' disclosures were for personal gain, while his disclosure exposed and led to correcting an Agency mistake. He thus argues that revealing the text message to a reporter served the public interest, and that his termination undermined the efficiency of the service.

The government counters that the Board did not abuse its discretion when it determined that Mr. MacLean's termination promoted the efficiency of the service. The government argues that there is no evidence that Mr. MacLean's actions made the flying public safer. The government contends that, because even a possibility that a Marshal may be onboard is an important deterrent to terrorist activity, Mr. MacLean's disclosure compromised flight safety and forced the Agency to reallocate scarce resources to address this new vulnerability. The government explains that, although Mr. MacLean was a first-time offender with a clean record, he was properly removed because his disclosure could have had catastrophic consequences. The government argues that Mr. MacLean differs from the Marshals who kept their jobs in spite of SSI breaches because those Marshals compromised only individual flights and showed remorse.

We agree with the government. The Board analyzed the relevant *Douglas* factors and did not abuse its discretion in concluding that Mr. MacLean's removal was not a disparate penalty. *MacLean II*, 116 M.S.P.R. at 576, 580-81. Unlike other Marshals, Mr. MacLean revealed that multiple flights would be unprotected, and we cannot say that it was unreasonable for the Board to find that Mr. MacLean's belief that he was doing the right thing was outweighed by the resulting threat to public safety. Moreover, it was not unreasonable for the Board to determine that Mr. MacLean's conduct "caused the [A]gency to lose trust in him," *id.* at 579, because Mr. MacLean admitted that he has "no regrets" and "feel[s] no remorse for going

to a credible and responsible media representative," *id.* at 576. Given these circumstances, the Board did not abuse its discretion by upholding Mr. MacLean's removal.

III. Mr. MacLean's Prohibited Personnel Practice Claim

The Board rejected Mr. MacLean's argument that the Agency violated the Civil Service Reform Act by investigating him in retaliation for his FLEOA activities.[1] The statute at issue prohibits individuals in positions of authority from discriminating against a government employee "on the basis of conduct which does not adversely affect the performance of the employee . . . or the performance of others." 5 U.S.C. § 2302(b)(10)(A). The Board concluded that Mr. MacLean's prohibited personnel practice challenge failed because he did not "meet his burden to establish that the reason articulated by the [A]gency was pretextual and that the real reason underlying that decision was his FLEOA activities." *MacLean II*, 116 M.S.P.R. at 575. Mr. MacLean reasserts his discrimi-

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[1] The government submitted a letter arguing that the Board lacked jurisdiction over Mr. MacLean's prohibited personnel practice claim. The government's argument is unsupported by the applicable statutes. The Board has jurisdiction to entertain prohibited personnel practice claims under 5 U.S.C. § 7701(c)(2), which states that "the agency's decision may not be sustained . . . if the employee . . . shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title." Section 7701 applies to Agency employees by virtue of 49 U.S.C. § 40122(g)(2)(H).

nation argument on appeal. He contends that the Agency investigated him because of his 2004 appearance on NBC Nightly News, which he made as part of his advocacy on behalf of FLEOA.

We agree with the government that substantial evidence supports the Board's conclusion that the Agency did not discriminate against Mr. MacLean on the basis of his FLEOA activities. Agency Policy Directive ADM 3700 "regulate[s] and prohibit[s] [Marshals'] unauthorized contact with the media," and record evidence is consistent with the AJ's determination that Mr. MacLean was initially investigated for his unauthorized media appearance, not for his FLEOA activities. J.A. 27. Indeed, it is undisputed that the Agency began to investigate Mr. MacLean "within days of his unauthorized appearance" on NBC Nightly News, which was "approximately 22 months after he began organizing and leading the [FLEOA] chapter." J.A. 55 (quotation marks omitted). Although the Agency ultimately did not pursue the media appearance charge and focused on the SSI disclosure charge, the initial investigation does not appear to be frivolous or pretextual because it was justified by Directive ADM 3700.

IV. Mr. MacLean's Affirmative Defense Under the WPA

The WPA prohibits individuals in positions of authority from taking a "personnel action" against a government employee in certain circumstances, particularly

> because of any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences . . . a substantial and specific danger to public health or safety, if such disclosure is *not specifically prohibited by law*. . . .[2]

5 U.S.C. § 2302(b)(8) (emphasis added). The Board rejected Mr. MacLean's affirmative defense that his disclosure of the text message was protected whistleblowing activity because it determined that the disclosure was "specifically prohibited by law" within the meaning of the WPA. The law that the Board relied upon is the ATSA, which states, in relevant part:

> Notwithstanding section 552 of title 5 . . . . , the Secretary of Transportation *shall prescribe regulations prohibiting disclosure of information* obtained or developed in ensuring security under this title *if the Secretary of Transportation decides disclosing the information would . . . be detrimental to transportation safety.*

49 U.S.C. § 40119(b)(1) (2009) (emphases added). Because its conclusion that revealing the content of the text message was specifically prohibited by the ATSA made further WPA inquiry unnecessary, the Board did not reach the question of whether Mr. MacLean "reasonably believe[d]" that this information "evidence[d] . . . a substantial and specific danger to public

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[2] The WPA was recently amended by the Whistleblower Protection Enhancement Act (WPEA). Neither party argues that the WPEA applies to this appeal.

. . . safety." 5 U.S.C. § 2302(b)(8); *see MacLean II*, 116 M.S.P.R. at 581.

The parties do not dispute that, in order to fall under the WPA's "specifically prohibited by law" proviso, the disclosure must be prohibited by a statute rather than by a regulation. Thus, the core of the disagreement is whether the ATSA "specifically prohibit[s]" disclosure of information concerning coverage of flights by Marshals within the meaning of the WPA.

Mr. MacLean and his amici (three members of Congress) argue that the Board erroneously concluded that the ATSA's mandate to the Secretary of Transportation to "prescribe regulations prohibiting disclosure" of certain kinds of information is a specific prohibition under the WPA. They contend that the phrase "specifically prohibited by law" in the WPA can only refer to explicit statutory language that identifies specific classes of information. They argue that the ATSA's "detrimental to transportation safety" language does not establish particular criteria for withholding information and leaves a great deal of discretion to the Agency, which is inconsistent with the WPA's requirement of specificity. They contrast the ATSA with the Trade Secrets Act, which directly authorizes removal of any federal employee who divulges information that falls into particular categories. 18 U.S.C. § 1905 (2008); *see also Kent v. Gen. Servs. Admin.*, 56 M.S.P.R. 536, 540-46 (1993).

The government counters that Mr. MacLean violated a regulation promulgated pursuant to an express legislative directive in the ATSA, which made his dis-

closure "specifically prohibited" by a statute. It thus argues that Mr. MacLean's disclosure does not qualify for WPA protection. The government contends that Mr. MacLean's reading of the WPA eviscerates laws that provide for any Agency discretion in classifying information as SSI, and thus disables Congress from directing agencies to pass nondisclosure regulations. Lastly, the government argues that it does not make sense for Congress to order an agency to promulgate nondisclosure regulations and at the same time prohibit that agency from disciplining an employee for violating those regulations by providing a defense under the WPA.

We agree with Mr. MacLean that the ATSA does not "specifically prohibit" the disclosure at issue in this case. The ATSA's plain language does not expressly prohibit employee disclosures, and only empowers the Agency to prescribe regulations prohibiting disclosure of SSI "*if the Secretary decides* disclosing the information would . . . be detrimental to public safety." 49 U.S.C. § 40119(b) (emphasis added). Thus, the ultimate source of prohibition of Mr. MacLean's disclosure is not a statute but a regulation, which the parties agree cannot be "law" under the WPA.

Notably, Congress changed the language "specifically prohibited by law, rule, or regulation" in the statute's draft version to simply "specifically prohibited by law." Congress did so because it was concerned that the broader language "would encourage the adoption of internal procedural regulations against disclosure, and thereby enable an agency to discourage an em-

ployee from coming forward with allegations of wrongdoing." S. Rep. No. 969, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743. Congress explained that only "a statute which requires that matters be withheld from the public as to leave no discretion on the issue, or . . . which establishes particular criteria for withholding or refers to particular types of matters to be withheld" could qualify as a sufficiently specific prohibition. *Id.* In contrast, the "detrimental to transportation safety" language of the ATSA does not describe specific matters to be withheld. It provides only general criteria for withholding information and gives some discretion to the Agency to fashion regulations for prohibiting disclosure. Thus, the ATSA does not "specifically prohibit" employee conduct within the meaning of the WPA.

The ATSA's insufficient specificity becomes even more apparent when it is contrasted with statutes that have been determined to fall under the WPA's "specifically prohibited by law" proviso. For example, the Trade Secrets Act, which the Board in *Kent* held to qualify as a specific prohibition, is extremely detailed and comprehensive. 56 M.S.P.R. at 543-46. That statute penalizes federal employees who "divulge[] . . . any information coming to [them] in the course of [their] employment . . . which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. . . . " 18 U.S.C. § 1905. The same is true of § 6013

of the Internal Revenue Code, which the Ninth Circuit in *Coons v. Secretary of the Treasury*, 383 F.3d 879, 890-91 (9th Cir. 2004), held to fall within the meaning of the WPA's "specifically prohibited" language. That statute prohibits federal employees from "disclos[ing] any return or return information obtained by him in any manner in connection with his service," 26 U.S.C. § 6013(a)(1), and then goes on to define "return" and "return information" in explicit detail, mentioning such things as "a taxpayer's identity, the nature, source or amount of his income, payments, receipts, deductions, exemptions, credits, assets, overassessments, or tax payments . . . ," *id.* § 6013(b)(1), (2). Thus, when Congress seeks to prohibit disclosure of specific types of information, it has the ability to draft the statute accordingly.

Nonetheless, we note that the ATSA's charge to the Secretary of Transportation to prescribe regulations pursuant to specific criteria (i.e., only information that would be detrimental to transportation safety) makes this a very close case. Indeed, the ATSA appears to fall in the middle of the spectrum of statutes flanked at opposite ends by (a) those that fall squarely under the WPA's "specifically prohibited by law" proviso, such as the Trade Secrets Act and § 6013 of the Internal Revenue Code, and (b) those in which Congress delegates legislative authority to an administrative agency without circumscribing the agency's discretion. Regulations promulgated pursuant to Congress's express instructions would qualify as specific legal prohibitions. In this case, given the clarity of the statutory language and legislative intent behind the WPA's specificity re-

quirement, the parameters set by Congress are not enough to push the ATSA over that threshold.

We are similarly unpersuaded by the government's argument that a parade of horribles necessarily follows our adoption of Mr. MacLean's interpretation of the WPA. The government argues that, if Mr. MacLean is allowed to pursue his whistleblower defense, the WPA would in effect prohibit later Congresses from directing agencies to pass nondisclosure regulations. The government is concerned that, under Mr. MacLean's reading, the WPA would prohibit agencies from disciplining employees for violating nondisclosure regulations and thereby prevent agencies from enforcing such regulations.

The government is mistaken. In spite of the WPA, Congress remains free to enact statutes empowering agencies to promulgate and enforce nondisclosure regulations, and it has done so in the ATSA. The government ignores the fact that the ATSA covers a wide range of conduct that would not qualify as whistleblowing. For example, no one disputes that the ATSA empowers the Agency to promulgate regulations that enable it to discipline employees who reveal SSI for personal gain or due to negligence, or who disclose information that the employee does not reasonably believe evidences a substantial and specific danger to public health or safety. The WPA also does not prohibit the Agency from following the ATSA's mandate to regulate public access to information that the Agency might otherwise be forced to disclose under the Freedom of Information Act (FOIA). Indeed, it appears

that the paramount goal of the ATSA is to empower the Agency to reject the public's requests for Agency intelligence because the statute recites that, "[n]otwithstanding [FOIA] . . . , the Secretary of Transportation shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title." 49 U.S.C. § 40119(b)(1); *see also Public Citizen, Inc. v. FAA*, 988 F.2d 186, 194-196 (D.C. Cir. 1993) (analyzing the predecessor statute to the ATSA and explaining that Congress's desire to enable the Agency to bar FOIA requests for information that qualifies as SSI was one of the driving forces behind the passage of that statute). Our interpretation of the WPA does not deprive the ATSA of meaning.

CONCLUSION

Because Mr. MacLean's disclosure is not "specifically prohibited by law" within the meaning of the WPA, we *vacate* the Board's decision and *remand* for a determination whether Mr. MacLean's disclosure qualifies for WPA protection. For example, it remains to be determined whether Mr. MacLean reasonably believed that the content of his disclosure evidenced a substantial and specific danger to public health or safety.

VACATED AND REMANDED

WALLACH, Circuit Judge, concurring.

Mr. MacLean presented substantial evidence that he was not motivated by personal gain but by the desire to protect the public. He averred proof that he

sought direction from his supervisors before making allegedly protected disclosures. While I join in the analysis and the result of the majority opinion, I concur to emphasize that the facts alleged, if proven, allege conduct at the core of the Whistleblower Protection Act.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2011MSPB 70

Docket No.: SF-0752-06-0611-I-2

ROBERT J. MACLEAN, APPELLANT

v.

DEPARTMENT OF HOMELAND SECURITY, AGENCY

July 25, 2011

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶ 1 The appellant petitions for review of the initial decision that sustained his removal. For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision AS MODIFIED herein. The appellant's removal is SUSTAINED.

BACKGROUND

¶ 2 Except where specified otherwise, the following facts are not in dispute. Shortly after the terrorist attacks of September 11, 2001, the appellant was appointed to the position of Civil Aviation Security Specialist, also known as Federal Air Marshal (FAM). He was originally employed in the Department of Transportation, specifically the Federal Aviation Administration (FAA). Initial Appeal File (IAF), Tab 4, Subtabs 4S, 4U. He was transferred to the Transportation Security Administration (TSA) when that agency was created in late 2001 for the purpose of promoting aviation security, among other things. *See* Pub. L. No. 107-71, 115 Stat. 597, § 101. In early 2003 the appellant became an employee of the Department of Homeland Security (DHS) when TSA's workforce and functions were transferred to DHS. *See* Pub. L. No. 107-296, 116 Stat. 2135, 2178, § 403.

¶ 3 In July 2003, the appellant received a briefing from TSA concerning a "potential plot" to hijack U.S. airliners. Hearing Transcript (Tr.) at 80-82. Soon after the briefing, TSA officials sent a directive to FAMs that all Remain Overnight (RON) missions in early August would be cancelled.[1] At the time of the directive, the perti-

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[1] The record is not entirely clear as to the precise dates that overnight missions were to be cancelled, but there is no dispute that the directive covered multiple days during the period August 1-9, 2003. Tr. at 52, 112. Pinpointing the exact dates is unnecessary to our analysis.

nent regulations prohibited disclosure of Sensitive Security Information (SSI) to the public. 67 Fed. Reg. 8340, 8351 (2002) (promulgating 49 C.F.R. §§ 1520.3 & 1520.5 as a Final Rule). Under the definition in effect at the time of the directive, SSI consisted of, among other things, "[s]pecific details of aviation security measures," including but not limited to "information concerning specific numbers of Federal Air Marshals, deployments, or missions." 67 Fed. Reg. 8340, 8352 (2002) (promulgating 49 C.F.R. § 1520.7). In July 2003, each FAM was equipped with a Personal Digital Assistant (PDA) on which he could receive encrypted messages from TSA. The appellant received the directive cancelling RONs as an unencrypted text message on his cell phone, however. Tr. at 78-82. The message was not labeled as SSI. *Id.* at 82-83.

¶ 4 The appellant believed that the suspension of overnight missions during a hijacking alert created a danger to the flying public and was inconsistent with what "the law mandated." Tr. at 84, 88. He raised his concerns with his supervisor and with an employee in the agency's Inspector General's office but was not satisfied with the responses he received. *Id.* at 84-88. The appellant then revealed the contents of the RON directive to a reporter from MSNBC, with the hope that the reporter could create a controversy resulting in rescission of the directive. Tr. at 108-110; IAF, Tab 4, Subtab 4J at 11. On Tuesday, July 29, 2003, MSNBC published an article

on its website entitled "Air Marshals Pulled from Key Flights." The article stated that "[d]espite renewed warnings about possible airline hijackings, the Transportation Security Administration has alerted federal air marshals that as of Friday they will no longer be covering cross-country or international flights, MSNBC.com has learned." IAF, Tab 4, Subtab 4J at 17. The appellant was not identified in the article. *See id.* Members of Congress criticized TSA's suspension of overnight missions, and the directive was withdrawn before it went into effect. Tr. at 92.

¶ 5 After this series of events, the appellant came to believe that FAMs should speak with "a collective voice," so he became active in the Federal Law Enforcement Officers Association (FLEOA). Tr. at 92. About a year later, the appellant appeared on NBC Nightly News, in disguise and identified as Air Marshal "Mike," when he asserted that the agency's dress code allowed would-be terrorists to identify FAMs. IAF, Tab 4, Subtab 4J at 10; Refiled Appeal File (RAF), Tab 45, Ex. TT. Someone from TSA recognized his voice, and TSA ordered an investigation into the appellant's "unauthorized media appearance." During the investigation, the appellant admitted that he was the one who told the press about the 2003 suspension of overnight missions. IAF, Tab 4, Subtab 4J at 10.

¶ 6 The agency proposed the appellant's removal on charges of: (1) Unauthorized Media Ap-

pearance; (2) Unauthorized Release of Information to the Media; and (3) Unauthorized Disclosure of Sensitive Security Information. IAF, Tab 4, Subtab 4G. The deciding official, Special Agent in Charge Frank Donzati, sustained only the third charge and imposed removal. *Id.*, Subtab 4A. Subsequently, TSA issued an August 31, 2006 order finding that the 2003 directive regarding overnight missions was SSI. IAF, Tab 22 (attachment).

¶ 7 On appeal, and following a dismissal without prejudice to allow the appellant to contest the agency's August 31, 2006 order in the United States Court of Appeals for the Ninth Circuit, IAF, Tab 29, the administrative judge certified several rulings for interlocutory review, RAF, Tab 14. In the resulting decision, the Board held as follows:

- The Board lacks the authority to determine for itself whether the particular information the appellant disclosed in 2003 was SSI. The appellant obtained a dismissal without prejudice for the purpose of instituting an action in federal court seeking a declaration that the information he disclosed was not SSI. The court found that the information he disclosed was SSI.[2] The Board and the parties are

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[2] The Court also determined that the TSA order did not constitute an improper, retroactive agency adjudication, but that "the agency applied regulations that were in force in 2003 to determine

bound by the result of that litigation, regardless of the fact that the agency did not expressly deem the 2003 instruction to be SSI until after it removed the appellant.

- The appellant's disclosure of SSI to the media cannot constitute protected whistleblowing because the appellant violated agency regulations when he made the disclosure. The decision in *Kent v. General Services Administration*, 56 M.S.P.R. 536 (1993)—where the Board had held that the exception to whistleblower coverage for disclosures "specifically prohibited by law," 5 U.S.C. § 2302(b)(8)(A), applies only to disclosures prohibited by statute—was modified.

MacLean v. Department of Homeland Security, 112 M.S.P.R. 4 (2009) (*MacLean I*).

¶ 8 Upon return of the case to the regional office, the administrative judge held a hearing and issued an initial decision upholding the appellant's removal. RAF, Tab 84. The administrative judge first explained at length why he found not credible the appellant's testimony that he did not think the 2003 directive was SSI when he disclosed it to the reporter. *Id.* at 14-18. The administrative judge then sustained the charge of unauthorized disclosure of SSI. *Id.* at 18-19.

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that information created in 2003 was [SSI]." *MacLean v. Department of Homeland Security*, 543 F.3d 1145, 1152 (9th Cir. 2008).

¶ 9 The administrative judge found unproven the appellant's affirmative defense that the agency violated 5 U.S.C. § 2302(b)(10), which prohibits discrimination because of "conduct which does not adversely affect the performance of the employee or applicant or the performance of others."[3] According to the appellant, the agency targeted him because he became active in FLEOA, and his removal for unauthorized disclosure of SSI was a pretext. The administrative judge weighed the evidence and concluded that this claim was unproven. *Id.* at 20-23. Turning to the appellant's First Amendment claim, the administrative judge found that the appellant's 2003 disclosure to MSNBC addressed a matter of public concern, but that the appellant's right to speak was outweighed by the agency's need to control dissemination of information about aviation security measures. *Id.* at 23-28.

¶ 10 Finally, the administrative judge found that the penalty was reasonable. In doing so, he concluded that deciding official Donzanti properly considered the relevant factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). RAF, Tab 84 at 30. The administrative judge specifically found that, among other things, Donzanti considered that the appellant's disclosure of SSI was serious because it created a

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[3] The appellant concedes that, as a FAM, he was not covered by the federal labor-relations statute at 5 U.S.C. ch. 71, and thus his activity was not protected by 5 U.S.C. § 2302(b)(9). RAF, Tab 67 at 5.

"vulnerability" as soon as the appellant made the disclosure. *Id.* at 30-31. The administrative judge further found that the offense was intentional, i.e., the appellant intentionally made a statement including the SSI to a reporter and he was on clear notice that the information should not be publicly revealed. *Id.* at 31-33. He noted the appellant's sworn statement that he had no regrets and felt no remorse for going to the media, and his sworn deposition testimony that it did not matter to him whether or not the information conveyed to the reporter was SSI. *Id.* at 31-32. The administrative judge also distinguished the comparison employees identified by the appellant purporting to evidence inconsistency of penalties. *Id.* at 35-37.

¶ 11 The appellant has filed a timely petition for review contesting all of the administrative judge's major findings and conclusions, raises affirmative defenses not raised below, and requests to submit evidence not submitted below. Petition for Review (PFR) File, Tabs 1 (original submission), 2 (supplement to PFR) & 4 (corrected PFR). The agency has responded in opposition to the PFR. *Id.*, Tab 8. The appellant has filed a reply to the agency's response. *Id.*, Tab 9. The agency moves to strike the appellant's reply, *id.*, Tab 10, and the appellant opposes the motion to strike, *id.*, Tab 11.[4] The appellant also has filed another

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[4] The Board's rules do not provide for replies to responses to petitions for review. *See* 5 C.F.R § 1201.114(i); *Santella v. Special*

motion to introduce "new" evidence, which the agency has opposed. *Id.*, Tabs 12-13. The Honorable Dennis Kucinich and Honorable Carolyn Maloney, U.S. House of Representatives, have filed a motion with the Board requesting leave to file an amicus curiae brief. *Id.*, Tab 14. We grant the Representatives' motion.[5]

ANALYSIS

The administrative judge correctly sustained the charge.

¶ 12 The agency removed the appellant based on the charge of "Unauthorized Disclosure of Sensitive Security Information." In support of the charge, the agency specified as follows:

> On July 29, 2003, you disclosed Sensitive Security Information in an unauthorized manner. Specifically, you informed the media that all

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Counsel, 86 M.S.P.R. 48, ¶ 10 (2000), *aff'd on reconsideration*, 90 M.S.P.R. 172 (2001), *aff'd*, 328 F.3d 1374 (Fed. Cir. (2003). We therefore grant the agency's motion to strike the appellant's reply for this reason and because it was filed weeks after the date the record closed on review (as extended), does not purport to be based on previously-unavailable evidence, and is largely repetitive of arguments raised in the petition for review. Nonetheless, while we thus did not consider the reply in deciding this matter, we have directed the Clerk of the Board to retain the appellant's reply in the case file in order to preserve the appellate record.

[5] We accept the Representatives' amicus brief into the record, and we have considered it in deciding the appeal. Because we conclude that the arguments contained in the amicus brief do not affect the outcome of the appeal, we have not requested any response from the agency or the appellant.

> Las Vegas FAMs were sent a text message to their government issued mobile phones that all RON (Remain Overnight) missions up August 9th would be cancelled, or words to that effect. You admitted and acknowledged the foregoing during an official, administrative inquiry regarding your conduct.
>
> The media person to whom you disclosed this information is not a covered person within the meaning of the SSI regulations, 49 C.F.R. Part 1520. The information you improperly disclosed concerned RON deployments. Such information is protected as SSI pursuant to 49 C.F.R. § 1520.5(b)(8)(ii)[,] which safeguards "Information concerning the deployments, numbers and operations of . . . Federal Air Marshals . . . " The disclosure of this SSI had the potential to reveal vulnerabilities in the aviation security system, and as such, was extremely dangerous to the public we serve.

IAF, Tab 4, Subtab 4G at 2 (punctuation and capitalization in original).[6]

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[6] The regulation quoted in the charge, 49 C.F.R. § 1520.5(b)(8)(ii), is from the version in effect when the agency issued the proposal notice. *See* 69 Fed. Reg. 28066, 28083 (2004) (promulgating a revised 49 C.F.R. Part 1520 as an interim final rule with request for comments). The version in effect in July 2003 when the appellant divulged the text message to the reporter was codified under a different number but was substantively the same as the regulation quoted in the charge. *See* 67 Fed. Reg. 8340, 8352 (2002) (promulgating a final rule defining SSI at 49 C.F.R. § 1520.7(j) as including

¶ 13 The appellant argues that the administrative judge erred in sustaining the charge without making a finding whether he had a "good faith belief" that he was permitted to disclose the contents of the text message to the reporter. PFR File, Tab 4 at 18. The appellant also argues at length that the administrative judge was wrong to reject, as not credible, his testimony that he did not know the text message was SSI. *Id.* at 19-30. The agency argues that intent is not an element of the charge. PFR File, Tab 8 at 9. We agree with the agency. The charge, as titled and as described in the specification, did not contain a specific intent element; the agency did not allege in its charge that the appellant engaged in intentional misconduct. Some charges, such as falsification, by their very nature require a showing of intent. *See Naekel v. Department of Transportation*, 782 F.2d 975, 978 n.3 (Fed. Cir. 1986); *Baracker v. Department of the Interior*, 70 M.S.P.R. 594, 599 (1996). Because the agency in this case did not bring such a charge, the Board may sustain the charge without a showing of intentionality, willfulness, knowingness, or the like, as long as imposing discipline for the conduct promotes the efficiency of the service. 5 U.S.C. § 7513(a); *see Fernandez v. Department of Agri-*

"information concerning specific numbers of Federal Air Marshals, deployments, or missions"). The appellant does not contend that he was prejudiced by the agency's citation of the later version of the regulation in the charge.

culture, 95 M.S.P.R. 63 ¶¶ 6-8 (2003); *Cross v. Department of the Army*, 89 M.S.P.R. 62, ¶¶ 8-9 (2001).

¶ 14 Under the regulations in effect in July 2003, information relating to the deployment of FAMs was included within the definition of SSI. 67 Fed. Reg. 8352 (2002) (49 C.F.R. § 1520.7(j)). The appellant was not authorized to release SSI to a reporter, 67 Fed. Reg. 8351 (49 C.F.R. §§ 1520.1(a), 1520.3(a)-(b)), nor was the reporter someone with a "need to know" SSI, 67 Fed. Reg. 8352 (49 C.F.R. § 1520.5). Imposing discipline for the appellant's disclosure of the text message to a reporter promotes the efficiency of the service because maintaining confidentiality of plans for FAM deployments goes to the heart of one of TSA's missions, that of promoting civil aviation safety and security.

The appellant's disclosure to the MSNBC reporter is not protected whistleblowing because it was "specifically prohibited by law."

¶ 15 It is a prohibited personnel practice for an agency to impose discipline because of an employee's disclosure of "information . . . which the employee . . . reasonably believes evidences—(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law. . . . " 5 U.S.C.

§ 2302(b)(8)(A). In *MacLean I*, the Board held that the appellant's disclosure of the 2003 directive concerning overnight missions to a reporter was not protected whistleblowing because it was "specifically prohibited by law." *MacLean*, 112 M.S.P.R. 4, ¶¶ 20-33. The appellant argues that this holding was incorrect and asks that we overrule it. PFR File, Tab 4 at 60-63.

¶ 16 The law of the case doctrine refers to the practice of courts in refusing to reopen what already has been decided in an appeal, and of following a prior decision in an appeal of the same case. *Hoover v. Department of the Navy*, 57 M.S.P.R. 545, 552 (1993). These rules do not involve preclusion by final judgment, but instead regulate judicial affairs before final judgment. *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 339 (1995). There are three recognized exceptions to the law of the case doctrine: The availability of new and substantially different evidence; a contrary decision of law by controlling authority that is applicable to the question at issue; or a showing that the prior decision in the same appeal was clearly erroneous and would work a manifest injustice. *Hudson v. Principi*, 260 F.3d 1357, 1363-64 (Fed. Cir. 2001); *Peartree*, 66 M.S.P.R. at 337; *Hoover*, 57 M.S.P.R. at 553. We decline the appellant's invitation to overrule the Board's 2009 decision because that decision was not "clearly erroneous," and he has not alleged any other bases for deviating from the law of the case.

¶ 17 We recognize that the Board's decision in *MacLean I* could be read broadly to allow any regulation that meets certain conditions to be accorded the full force and effect of law, and thus, a disclosure in violation of such a regulation could be construed as "prohibited by law" under 5 U.S.C. § 2302(b)(8)(A). We find that such a broad ruling is unnecessary to resolve the issues presented by this appeal and is inconsistent with the policies that Congress embodied in the Whistleblower Protection Act ("WPA"). We therefore modify *MacLean I* to the extent it is inconsistent with the decision we issue today. Rather, we find that the appellant's disclosure of SSI was "specifically prohibited by law" because the regulation that he violated when he disclosed information about FAM deployments was promulgated pursuant to an explicit Congressional mandate that required TSA to prohibit such disclosures. Specifically, in enacting Pub. L. No. 103-272, § 101, 108 Stat. 745, 1117 (July 5, 1994), codified at 49 U.S.C. § 40119,[7] Congress expressly required that TSA is-

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[7] The statute states in pertinent part as follows:

(b) DISCLOSURE. (1) Notwithstanding section 552 of title 5, the Administrator shall prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security or research and development activities under section 44501(a) or (c), 44502(a)(1) or (3), (b), or (c), 44504, 44505, 44507, 44508, 44511, 44512, 44513, 44901, 44903(a), (b), (c), or (e), 44905, 44912, 44935, 44936, or 44938(a) or (b) of this title if the Administrator decides disclosing the information would—(A) be an unwarranted invasion of personal privacy; (B) reveal a trade

sue aviation-related regulations "prohibiting disclosure of information obtained or developed in carrying out security" if, in the agency's view, "disclosing the information" would "be detrimental to the safety of passengers in air transportation." 49 U.S.C. § 40119(b)(1)(C). Citing 49 U.S.C. § 40119 (among other authorities), on February 22, 2002, the Under Secretary of TSA[8] issued regulations on February 22, 2002, which identified SSI subject to this statutory nondisclosure as including information relating to FAM deployments. 67 Fed. Reg. 8340, 8351-52 (2002).[9] Furthermore,

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secret or privileged or confidential commercial or financial information; or (C) be detrimental to the safety of passengers in air transportation.

(2) Paragraph (1) of this subsection does not authorize information to be withheld from a committee of Congress authorized to have the information.

[8] In 2001, Congress enacted the legislation creating the Transportation Security Administration, which was charged with carrying out certain functions previously performed by the Federal Aviation Administration. *See* Pub. L. No. 107-71, 115 Stat. 597, 603 (Nov. 19, 2001). Section 101(e)(2) of that statute replaced the word "Administrator" [of the Federal Aviation Administration] in section 40119(b) with "Under Secretary," which refers to the Under Secretary of Transportation Security, *see* 49 U.S. § 1154(b)(1).

[9] The Board's 2009 decision cited 49 U.S.C. § 114(s) as the authority for the SSI regulations at 49 C.F.R. Part 1520. 112 M.S.P.R. 4, ¶ 10. However, section 114(s) (which was later redesignated as subsection (r), *see* Pub. L. No. 110-161, Div. E, § 568(a)), became law on November 25, 2002, *see* Pub. L. No. 107-296, 116 Stat. 2135, 2312, and TSA did not issue regulations under that specific statutory authority until May 18, 2004, *see* 69 Fed. Reg. 28066, 28082

the Ninth Circuit Court of Appeals has unequivocally declared that the information disclosed by the appellant constituted SSI as defined in those regulations. *See MacLean*, 543 F.3d at 1150.[10] Consequently, because the appellant disclosed information that is specifically prohibited from disclosure by a regulation promulgated pursuant to an express legislative directive from Congress to TSA,[11] we find that his disclosure was "specifi-

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(2004). Nevertheless, as explained above, 49 U.S.C. § 40119 (which is substantively similar to section 114(s)) gave the Under Secretary for Transportation Security the authority to issue regulations prohibiting the disclosure of information if such disclosure would be "detrimental to the safety of passengers in air transportation," the Under Secretary issued such regulations in 2002, *see* 67 Fed. Reg. 8340, 8351-52, and the appellant violated those regulations. The citation to 49 U.S.C. § 114(s) instead of section 40119 in the Board's 2009 decision had no affect on the outcome.

[10] Congress established judicial review of TSA final orders in the federal courts of appeals with exclusive review by the Supreme Court. *See* 49 U.S.C. §§ 46110(a) and (e) ("A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.") Thus, this Board has no authority to review the decision of the Ninth Circuit holding that the information that the appellant disclosed constituted SSI because it "contained 'specific details of aviation security measures' regarding 'deployment and missions' of [FAMs]" in violation of 49 C.F.R. § 1520.7(i). *MacLean*, 543 F.3d at 1150.

[11] The Board has no authority to review either the statutory mandate against disclosure, or the legality of the regulation issued pursuant thereto. *See Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985) (the Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation); 5 U.S.C. § 1204(f).

cally prohibited by law" so as to bring it outside the scope of the whistleblower protection provisions of 5 U.S.C. § 2302(b)(8).

¶ 18 We would share some of the concerns expressed by Representatives Kucinich and Maloney if *MacLean I* were given the broad sweep that they address in their amicus brief. As we have explained above, however, we limit our holding here and the reach of *MacLean I* in order to give effect to both the WPA and Congress's express intent to prohibit the public disclosure of aviation security information. The appellant's disclosure of FAM deployment information was not protected by the WPA because it was prohibited by SSI regulations issued by TSA in compliance with an express statutory requirement of Congress to issue regulations "prohibiting disclosure of information obtained or developed in carrying out security" if, in TSA's view, "disclosing the information" would "be detrimental to the safety of passengers in air transportation." 49 U.S.C. § 40119(b)(1)(C). To the extent that this statutory mandate encroaches upon the protections afforded by the WPA, it is for Congress, not the Board, to resolve the competing legislative objectives underlying these statutes.

¶ 19 Although the appellant's disclosure of information relating to FAM deployments to an MSNBC reporter does not constitute protected whistleblowing activity, our holding today does not mean that TSA may rely on its SSI regula-

tions as authority for prohibiting *all* disclosures relating to aviation security and safety. On the contrary, Congress has specified that the regulations issued pursuant to its mandate in 49 U.S.C. § 40119 may not prohibit disclosures to "a committee of Congress authorized to have the information." 49 U.S.C. § 40119(b); *see also* 49 U.S.C. § 114(r)(2). Additionally, we note that the "specifically prohibited by law" exclusion from WPA protection does not apply to disclosures made to the Office of Special Counsel. 5 U.S.C. § 2302(b)(8)(B); *see Parikh v. Department of Veterans Affairs*, 110 M.S.P.R. 295. ¶ 23 n.1 (2008). The appellant did not pursue either of these channels.[12]

¶ 20 Finally, the case of *Chambers v. Department of the Interior*, 602 F.3d 1370 (Fed. Cir. 2010), while appearing to have some similarity to this case, is distinguishable. Ms. Chambers, like the appellant herein, publicly disclosed information about the deployment of law enforcement officers. *Id.* at 1378. Ms. Chambers's disclosure of a substantial and specific danger to public health or safety, *id.* at 1379, was protected under 5 U.S.C. § 2302(b)(8)(A)(ii), however, because it was not

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[12] Because the appellant did not make his disclosure through either of the two authorized channels described above, we make no finding on whether, if he had, his disclosure would have been protected as evidencing a violation of law, rule, or regulation, a substantial and specific danger to public health or safety, or some other condition described at 5 U.S.C. § 2302(b)(8).

"specifically prohibited by law." By contrast, while the appellant was also arguably disclosing a substantial and specific danger to public health or safety, his disclosure cannot similarly be protected under 5 U.S.C. § 2302(b)(8)(A)(ii) because it contained SSI, the disclosure of which was "specifically prohibited by law" under a regulatory nondisclosure scheme mandated by Congress.

The appellant's removal based on his 2003 SSI disclosure did not violate his First Amendment right of free speech.

¶ 21 The appellant contends that the agency violated his First Amendment right to freedom of speech by removing him for his 2003 disclosure of SSI to the MSNBC reporter.[13] The administrative judge found the appellant's First Amendment claim unproven, finding that under the balancing test outlined in *Pickering v. Board of Education of Township High School District 205, Will Count, Illinois*, 391 U.S. 563, 568 (1968), the ap-

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[13] In the summary of the prehearing conference, the administrative judge did not list as an affirmative defense a claim by the appellant that that his disclosure to MSNBC in 2003 about the suspension of overnight missions was protected under the First Amendment. RAF, Tab 67. The appellant made that argument in his post-hearing brief, however, RAF, Tab 79 at 16-18, the administrative judge addressed it in the initial decision, RAF, Tab 84 at 23-28, and the agency does not argue on review that the issue should not have been considered, PFR File, Tab 8 at 19-20. Under the circumstances, we deem the appellant's claim that his 2003 disclosure to MSNBC was protected free speech under the First Amendment to be properly before us.

pellant's interest in commenting on a matter of public concern, *i.e.*, the 2003 directive regarding overnight missions, was outweighed by the interest of the agency, as employer, in promoting aviation security. The appellant challenges this finding. PFR File, Tab 4 at 56-57. We note, in this regard, courts have recognized that law enforcement duties entail special obligations with regard to public trust that may be considered in the *Pickering* balancing. *See, e.g., United States v. Aguilar*, 515 U.S. 593, 606 (1995); *O'Donnell v. Barry*, 148 F.3d 1126, 1135 (D.C. Cir. 1998); *Cochran v. City of Los Angeles*, 222 F.3d 1195, 1201 (9th Cir. 2000); *Bennett v. City of Holyoke*, 230 F. Supp. 2d 207, 225 (D. Mass. 2002), *aff'd*, 362 F.3d 1 (1st Cir. 2004); *Pierson v. Gondles*, 693 F. Supp. 408, 418 (E.D. Va. 1988).

¶ 22 Here, the record reflects that the appellant revealed information about FAM deployments that the agency legitimately expected to remain confidential, and which created a vulnerability in the aviation system. We find that disciplining the appellant for releasing details of aviation security measures to a reporter did not violate his First Amendment right of free speech. *Cf. Chambers v. Department of the Interior*, 103 M.S.P.R. 375, ¶¶ 36-42 (2006) (disciplining a Chief of Police for disclosing information about officer patrols and her agency's budget to a reporter did not violate her First Amendment right of free speech), *aff'd in part, vacated in part on other*

grounds, and remanded, 515 F.3d 1362 (Fed. Cir. 2008).

¶ 23 We also believe the fact that the agency acted in this instance pursuant to, and consistent with, the aforementioned statutory and regulatory nondisclosure scheme mandated by Congress regarding aviation security, undercuts the appellant's constitutional claim. To the extent that the appellant's claim implicitly involves a challenge to the constitutionality of the statute authorizing the agency to issue the nondisclosure regulations, the Board lacks jurisdiction to hear such a claim. *See May v. Office of Personnel Management*, 38 M.S.P.R. 534, 538 (1988) (the Board has authority to adjudicate a constitutional challenge to an agency's application of a statute, but it is without authority to determine the constitutionality of federal statutes).

The appellant did not prove his prohibited personnel practice claim under 5 U.S.C. § 2302(b)(10).

¶ 24 As discussed above, the appellant also contends that the agency retaliated against him because of his FLEOA activities, thereby committing a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(10). The relevant statute pertinently provides:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

. . . .

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; . . . .

5 U.S.C. § 2302(b)(10).

¶ 25 The Board has not previously established the precise elements for proving a violation of 5 U.S.C. § 2302(b)(10). Depending on the specific facts and circumstances, the proscription of § 2302(b)(10) may be analogous to either (1) the prohibition against retaliation for exercising appeal rights, filing grievances, etc., found at 5 U.S.C. § 2302(b)(9), or to (2) a traditional claim of discrimination governed by the principles of Title VII. We find it unnecessary in this case, however, to decide the specific legal framework that the Board will apply to future § 2302(b)(10) claims because the appellant has failed to prove his claim under either standard.

¶ 26 To establish a prima facie violation of 5 U.S.C. § 2302(b)(10) applying the (b)(9) framework, the appellant must demonstrate that: (1) He engaged in activity that did not adversely affect his performance; (2) he was subsequently treated in an adverse fashion by the agency; (3) the deciding official had actual or constructive knowledge of the appellant's (b)(10) activity; and (4) there is a causal connection between the (b)(10) activity and

the adverse action. *See Crump v. Department of Veterans Affairs*, 114 M.S.P.R. 224, ¶ 10 (2010); *Wildeman v. Department of the Air Force*, 23 M.S.P.R. 313, 320 (1984); *see also Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986). Where, as here, the agency has already articulated a non-retaliatory reason for its action, i.e., the charged misconduct, it has done everything that would be required of it if the appellant had made a prima facie case. Thus, our inquiry proceeds directly to the ultimate question of whether, weighing all the evidence, the appellant has met his burden of proving illegal retaliation. *Crump*, 114 M.S.P.R. 224, ¶ 10; *see U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

¶ 27 If analyzed under the legal framework for traditional Title VII claims, in order to prevail the appellant had to show by preponderant evidence that he engaged in conduct that did not adversely affect his performance and that the agency intentionally discriminated against him for that conduct. In the absence of direct evidence of intentional discrimination, the appellant could meet this burden by introducing evidence giving rise to an inference of disparate treatment because of his conduct unrelated to his performance. *Davis v. Department of the Interior*, 114 M.S.P.R. 527, ¶ 7 (2010), *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Assuming that he did so, the burden of production shifts to the agency to articulate a legitimate, nondiscrimina-

tory reason for its action. *Id.*, ¶ 8. If the agency meets this burden, the appellant then must prove that the agency's stated reason is merely a pretext for discrimination prohibited by (b)(10) and the activity unrelated to his performance was the real reason for the disparate treatment. *Id.* In most adverse action appeals taken pursuant to 5 U.S.C. chapter 75, the agency has already articulated a nondiscriminatory reason for its action, *i.e.*, the charged misconduct; accordingly, the agency has done everything that would be required of it if an appellant had made out a prima facie case, and whether he in fact did so is no longer relevant. *See id.*, ¶ 9 n.3, *citing Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 6 (2008). As a result, the inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met his overall burden of proving illegal discrimination. *See id.*

¶ 28 Because either framework requires us to proceed to the ultimate question of whether the agency intentionally retaliated or discriminated against the appellant for his (b)(10) activities,[14] we have reviewed the record and we conclude that the appellant has failed to meet his burden to establish that the reason articulated by the agency for its decision to remove him was pretextual and that

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[14] We assume, without deciding, that the agency would commit a prohibited personnel practice in violation of § 2302(b)(10) if it removed the appellant in retaliation for his FLEOA activities.

the real reason underlying that decision was his FLEOA activities. Even if we were to accept appellant's contentions that agency managers disapproved of his FLEOA activities, *see, e.g.*, RAF, Tab 45 at 5-8, 19-27, there is no direct evidence that the agency retaliated or discriminated against him for engaging in FLEOA activities when it removed him from employment.

¶ 29 There is no question that the appellant disclosed SSI in violation of agency regulations prohibiting such disclosure and that this was the agency's stated basis for his removal. The appellant contends, though, that he was treated more harshly than other similarly situated individuals who disclosed SSI and also that he and other FLEOA leaders were singled out for retaliatory treatment. RAF, Tab 45 at 6-8. While the record reflects that the agency treated other employees less harshly for their disclosures of SSI, the circumstances surrounding those disclosures are sufficiently distinct from the instant case as to undercut any inference that the reason for the difference is discrimination based on the appellant's FLEOA activities. For instance, the disclosures attributed to J.S. or J.M. were limited to a small number of individuals (to a few passengers on a plane under exigent circumstances and to some airline personnel for personal reasons, respectively). As for A.R., we note that, in the single specification of the unauthorized disclosure of SSI charge, the agency alleged that A.R. "posted a message on www.delphiforums.com that

revealed security measures concerning the deployment of FAMS on international flights from the Atlanta Field Office." RAF, Tab 45, Exhibit F. Unlike the appellant's disclosure, which created a vulnerability in aviation security by revealing to a national news reporter that FAMs were no longer going to be present on *any* RON missions, A.R.'s disclosure appears to have been more limited because: it was disclosed on a single message board; it only identified FAM deployments out of the Atlanta Field Office; and it appeared to leave open the possibility that other offices would be responsible for those flights.

¶ 30 Further, the appellant's reliance on another individual, Frank Terreri, as similarly situated appears misplaced as the comparison actually undermines his claim that his FLEOA activities resulted in a harsher penalty. Mr. Terreri was the president of the air marshal chapter of FLEOA, engaged in outspoken criticism of agency management and its policies, and was investigated for releasing SSI. But he continues to be employed by TSA after the allegations made against him were deemed to be unfounded. Tr. at 60, 116-17.

¶ 31 Significantly, the administrative judge correctly found that the appellant demonstrated a lack of regret for disclosing the RON information, reflected, for example, in his deposition testimony to the effect that it did not matter to him if the information was confidential, law enforcement

sensitive, SSI or classified information. RAF, Tab 44, Exhibit 8; Tr. at 113-15, 118-23. The appellant also admitted during the Immigration and Customs Enforcement (ICE) Office of Professional Responsibility (OPR) investigation:

> Due to the fact that my chain of command, the DHS OIG and my Congressmen all ignored my complaints and would not follow them up with investigations, I have NO REGRETS or feel NO REMORSE for going to a credible and responsible media representative, Brock Meeks. Brock Meeks reporting these gross mismanagement issues has resulted in immediate and positive change in deadly FAMS policies.

IAF, Tab 4, Subtab 4J, Exhibit 2 (emphasis in original).

¶ 32 In the face of a clear Congressional directive for nondisclosure and a regulatory provision promulgated pursuant to that directive, which explicitly prohibits the type of public disclosure made by the appellant, the agency could and did reasonably infer a risk from the appellant's lack of remorse that he would continue to make disclosures that were prohibited by law. Thus, under the circumstances, we find that the appellant's lack of remorse to be a significant distinction justifying the agency's decision to remove him rather than imposing a lesser penalty. *Cf.* RAF, Tab 45, Exhibit F (the deciding official in A.R.'s case stated that he "plac[ed] a great deal of weight" on the fact that A.R. "demonstrated sincere remorse over this current incident" and "as-

sured" the deciding official that he would "demonstrate the utmost diligence when handling SSI information.").

¶ 33 Considering the record as a whole, we find that the appellant has not proven by a preponderance of the evidence that the agency intentionally discriminated or retaliated against him on the basis of his FLEOA activities in violation of 5 U.S.C. § 2302(b)(10).[15]

The Board will not consider the appellant's claim raised for the first time on petition for review that the agency initiated its investigation in retaliation for his engaging in protected whistleblowing and First Amendment speech.

¶ 34 For the first time on petition for review, the appellant argues that his 2004 appearance on NBC Nightly News was protected free speech under the First Amendment and protected whistleblowing under 5 U.S.C. § 2302(b)(8), and that the agency's investigation in response to his appearance was unlawful retaliation in violation of the First Amendment and the WPA. PFR File, Tab 4 at 53-60.

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[15] To the extent the appellant contends that the agency violated his First Amendment rights based on his involvement with FLEOA, we find, for all of the reasons explained by the administrative judge and in our discussion of the appellant's § 2302(b)(10) claim, that the agency took its actions based on the charged misconduct and not for his association with or activities on behalf of the FLEOA.

¶ 35 In the summary of the prehearing conference, the administrative judge stated as follows with respect to the appellant's affirmative defenses:

> Here, the appellant alleges that the agency discriminated and retaliated against him based on his membership and leadership status with the FLEOA for other than merit reasons in violation of 5 U.S.C. § 2302(b)(10); and that this discrimination and retaliation violated his First Amendment right of free association and his right to free speech. No other affirmative defenses are alleged in this appeal.

RAF, Tab 67 at 6. The administrative judge advised the parties that additional issues were precluded absent a timely meritorious objection. *Id.* at 5-6. The appellant did not make any objection, and the issues he now attempts to raise were not mentioned in the summary of the prehearing conference. The general rule under such circumstances is that the issues raised for the first time on review will not be considered. *See Henson v. U.S. Postal Service*, 110 M.S.P.R. 624, ¶ 10 (2009); *Wilson v. Department of Justice*, 58 M.S.P.R. 96, 101 n.4 (1993).

¶ 36 The appellant argues that we should make an exception to this general rule. He cites Board and federal appeals decisions for the principle that a new claim may be raised on review when the administrative judge confused or misled a party with respect to the claim, or when the party raising the claim has newly-discovered evidence. PFR File, Tab 4 at 58-60. While we do not

quarrel with the appellant's reading of the cases, the appellant makes no attempt to explain how the decisions he cites apply here. He does not allege, nor is there any evidence, that the administrative judge confused or misled him with respect to his claim regarding his 2004 appearance on NBC Nightly News. Rather, the appellant contends that by rejecting his FLEOA defense, in part, on the grounds of the appellant's own testimony that the 2004 television appearance was the catalyst for the agency's investigation, the administrative judge somehow "converted [his FLEOA defense] to a dispositive First Amendment violation" and "created a violation of the [WPA]." *Id.* at 54, 57-58. Even assuming the administrative judge found that the appellant's television appearance was the impetus for the investigation, we disagree with the appellant that this conclusion somehow "created" new claims that were not previously known to him.

¶ 37 Indeed, the appellant does not allege that he only discovered that his appearance on NBC Nightly News spurred the investigation after the record closed below. In fact, the appellant testified before the administrative judge that his 2004 appearance on NBC Nightly News is what caused the agency to initiate the investigation in which he admitted revealing the 2003 RON directive to MSNBC. Tr. at 93. In other words, the appellant knew before the record closed below what caused the agency to begin its investigation. Thus, this is not a case in which a party attempts

to raise a new claim on review based on evidence discovered after the record closed below. For these reasons, we will not consider the issues the appellant raises for the first time in his petition for review.

The Board also will not consider the new evidence submitted by the appellant on petition for review.

¶ 38 The Board does not accept the evidence that the appellant attempts to submit for the first time on review. The appellant requests to supplement the record with a transcript of a statement he gave to agency investigators on May 4, 2005. According to the appellant, the transcript undercuts the administrative judge's credibility determination on the question of whether the appellant was revealing SSI when he shared the July 2003 RON directive with MSNBC. *See* RAF, Tab 84 at 14-18; PFR File, Tab 1 at 73-89; *id.*, Tab 4 at 14. We deny the appellant's request to supplement the record for two reasons. First, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The appellant's own submission shows that he was provided with the transcript more than 3 years before the hearing. PFR File, Tab 1 at 71. Second, as we discuss in our analysis of the charge and penalty, the outcome of this case does not turn on whether the appellant credibly testi-

fied that he did not know the RON directive was SSI when he disclosed it to the MSNBC reporter. Thus, the transcript is immaterial to the outcome in the appeal.

The penalty of removal is within the bounds of reasonableness.

¶ 39 We affirm the administrative judge's thorough analysis of the penalty and we need not repeat all of it here. RAF, Tab 84 at 28-40. Some factors warrant further discussion, however. When the Board sustains all the charges, it reviews the agency's choice of penalty only to determine whether the agency considered all of the relevant factors and exercised management discretion within the parameters of reasonableness. *Ellis v. Department of Defense*, 114 M.S.P.R. 407, ¶ 11 (2010). The Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised. *Id.*; *see also Douglas*, 5 M.S.P.R. at 305-06. Here, as the administrative judge found, there is ample evidence that the agency considered all of the relevant factors. Tr. at 12-22; RAF, Tab 84 at 30.

¶ 40 The most important factor in an agency's penalty determination is the nature and seriousness of the misconduct and its relation to the appellant's duties, including whether the offense was intentional. *Jinks v. Department of Veterans Affairs*, 106 M.S.P.R. 627, ¶ 17 (2007). The appellant revealed information about FAM deployments in violation of regulations requiring that it

remain confidential. His actions caused the agency to lose trust in him, and divulging security measures to the media created an immediate vulnerability in the aviation system. Tr. at 15, 21-22. The appellant's revelation of confidential information to a reporter was intentional, by his own admission. Tr. at 108-110. Also significant to rehabilitative potential and the agency's penalty determination is that the appellant lacked remorse for disclosing the RON information, as reflected in his deposition. RAF, Tab 44, Exhibit 8; Tr. at 113-15, 118-23. The agency could and did reasonably infer a risk from the appellant's lack of remorse that he would continue to make disclosures that were specifically prohibited by law.

¶ 41 After thoughtfully considering the entire record, we also are not persuaded that the appellant believed in "good faith" that he was permitted to share plans for the deployment of FAMs with the MSNBC reporter. PFR File, Tab 4 at 29-30. At the time of his appointment in 2001, the appellant was presented with a single-page form captioned "Conditions of Employment for Federal Air Marshals." The appellant signed the form at the bottom, and initialed the form next to the following words: "I accept the position of Federal Air Marshal. I have read and I accept the Conditions of Employment." One of those conditions was that a FAM "may be removed" for "[u]nauthorized release of security-sensitive or classified information." IAF, Tab 4, Subtab 4T.

Apart from this written acknowledgment of the seriousness of unauthorized disclosure of SSI in general, the appellant testified that in his training it was made "very, very clear" that FAMs should not tell anyone, not even their spouses, which flights they would be on because the information could be repeated to "the wrong people." Tr. at 106-07. The appellant further testified that telling someone a flight would not have a FAM on it would endanger the flight. *Id.* at 108. Based on the foregoing, we find that the appellant knew that he was not permitted to share information about FAM coverage with a reporter, regardless of the fact that he received the information as a text message on his cell phone instead of on his encrypted PDA, and even if he was unsure of its SSI classification.

¶ 42 It makes no difference to our penalty analysis whether the appellant knew that the message suspending overnight missions fell within the regulatory definition of SSI. As explained immediately above, the appellant admittedly knew that he was not permitted to tell anyone about FAM scheduling, yet he did so anyway, and it could have created a significant security risk. As a law enforcement officer, the appellant can be held to a high standard of conduct. *Mahan v. Department of the Treasury*, 89 M.S.P.R. 140, ¶ 11 (2001); *Crawford v. Department of Justice*, 45 M.S.P.R. 234, 237 (1990). The appellant's actions in July 2003 did not exhibit the good judgment that the agency can legitimately expect of its law

enforcement personnel. *Mahan*, 89 M.S.P.R. 140, ¶ 11.

¶ 43 The appellant contends that he was treated more harshly than other similarly situated individuals who disclosed SSI and also that he and other FLEOA leaders were singled out for retaliatory treatment. RAF, Tab 45 at 6-8. As we explained when addressing the appellant's claim under 5 U.S.C. § 2302(b)(10), although the record reflects that the agency treated other employees less harshly for their disclosures of SSI, the circumstances surrounding those disclosures are plainly distinguishable and do no suggest that the agency subjected him to a disparate penalty.

¶ 44 We also accept, without finding, that the appellant believed he did the right thing in disclosing the information. We have specifically considered the appellant's testimony regarding his belief that TSA's plan to eliminate FAMs from overnight flights was "serious" and "dangerous to the . . . public," and that his disclosure was motivated by his desire to protect the flying public. Tr. at 88, 90; *see id.* at 122 ("All I wanted to do was protect lives and . . . uphold the law."). The appellant also testified: "If I saved—if I saved a plane from falling out of the sky or saved a life, I believe I did my job, and I shouldn't regret it." Tr. at 115. Further, as the administrative judge concluded, we also have no reason to doubt that the appellant's motivation was sincere. RAF, Tab 84 at 28 (the administrative judge, when

discussing the appellant's First Amendment claim, stated that he had "no reason to doubt the appellant's assertion that he took these actions to benefit the nation. . . ."). However, even if the appellant could have established the classic elements of whistleblowing, i.e., that he disclosed a substantial and specific danger to public safety and that his disclosure was a contributing factor in his removal,[16] he cannot invoke WPA protection because his disclosure was specifically prohibited by law.

¶ 45 For all of the above reasons as well as those explained by the administrative judge, we find that the agency's removal penalty did not exceed the bounds of reasonableness. The appellant's removal is SUSTAINED.

ORDER

¶ 46 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this

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[16] As we noted earlier, we do not determine whether the appellant's disclosure would be protected under the WPA because he did not make it through authorized channels. *Infra*, n.12.

final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

Docket No.: SF-0752-06-0611-I-2

ROBERT J. MACLEAN, APPELLANT

v.

DEPARTMENT OF HOMELAND SECURITY, AGENCY

INITIAL DECISION

Date: May 12, 2010

Before: FRANKLIN M. KANG, Administrative Judge

INTRODUCTION

The appellant timely appealed the Transportation Security Administration's (TSA) decision to remove him from the position of Federal Air Marshal (FAM), with duties in Los Angeles, California, effective April 11, 2006. Initial Appeal File 1 (IAF-1), Tab 1, 4. On October 5, 2006, an administrative judge dismissed this appeal without prejudice at the request of the appellant. IAF, Tab 29. This initial decision (ID) became final on November 9, 2006 when the parties declined to file a petition for review. *See id.*

On October 15, 2008, the appellant timely refiled this appeal. Initial Appeal File 2 (IAF-2), Tab 1. The Board assigned this refiled appeal to a second administrative judge. IAF-2. On June 22, 2009, the Board issued an Opinion and Order addressing matters certified for interlocutory appeal. IAF-2, Tab 27. On July 13, 2009, the second administrative judge informed the parties that the Board had ruled on the issues certified for interlocutory appeal and advised the parties that the adjudication would resume. IAF-2, Tab 29. Thereafter, this appeal was reassigned to a third administrative judge. IAF-2, Tab 31.

A hearing was held on November 5, 2009 as specified below. Hearing Compact Disc (HCD). The appellant traveled from California to Virginia to appear with his attorneys from the Board's Washington Regional Office by video-conference (VTC), while the agency appeared from the Board's Western Regional Office in California as well as the Washington Regional Office. *Id.* The Board has jurisdiction under 5 U.S.C. §§ 7511-7513 and 7701. For the reasons explained below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Burden of Proof and Applicable Law

The agency bears the burden of proof by preponderant evidence with respect to the reasons for the action and its choice of penalty. 5 C.F.R. § 1201.56(a). Preponderant evidence is defined as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to

find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c).

Background

At the time of his removal, the appellant, born in 1970 with a service computation date in 1992, was a preference eligible FAM, SV-1801-9, assigned to Los Angeles, California. IAF-1, Tab 4, Subtab 4F; IAF-2, Tab 45; Exhibit S. It is undisputed that the appellant was an employee pursuant to 5 U.S.C. § 7511(a)(1) at the time of his removal.

According to a Report of Investigation (ROI) in the record evidence, based on a September 2004 report of an unauthorized media appearance by the appellant, the agency initiated an investigation. IAF-1, Tab 4, Subtab 4J. On May 4, 2005, during an investigative interview conducted by the agency's Immigration and Customs Enforcement (ICE) Office of Professional Responsibility (OPR), the appellant submitted a signed and sworn affidavit stating in relevant part:

> For the July 29, 2003 article, I informed [the reporter] that all Las Vegas FAMs were sent a text message to their Government issued mobile phones that all RON (Remain Overnight) missions up to August 9 would be canceled. My supervisor told me that the Service ran out of funds for overtime, per diem, mileage and lodging.
>
> . . . .
>
> Due to the fact that my chain of command, the DHS OIG and my Congressmen all ignored my complaints and would not follow them up with investi-

> gations, I have NO REGRETS or feel NO REMORSE for going to a credible and responsible media representative, [the reporter]. [The reporter] reporting these gross mismanagement issues has resulted in immediate and positive change in deadly FAMS policies.

IAF-1, Tab 4, Subtab 4J (appellant's affidavit) (upper case lettering in original). Following this interview, the agency's investigators concluded, *inter alia*, that the appellant made an unauthorized release of information to the media. *Id.*, Subtab 4J.

On September 13, 2005, the appellant received a Proposal to Remove (proposal or proposed removal), charging the appellant with Unauthorized Media Appearance, Unauthorized Release of Information to the Media, and Unauthorized Disclosure of Sensitive Security Information (SSI). IAF-l, Tab 4, Subtab 4G. On April 10, 2006, Special Agent in Charge (SAC) Frank Donzanti issued a decision on the proposed removal, sustaining only the third charge and the proposed penalty. *Id.*, Subtab 4A.

The third charge, Unauthorized Disclosure of SSI, is accompanied by a single specification. IAF-2, Tab 67 at 5-6. The underlying specification contains background information and alleges that on July 29, 2003, the appellant informed the media that all Las Vegas FAMs were sent a text message on their government issued mobile phones that all remain overnight (RON) missions up to August 9th would be cancelled; or words to that effect, and that this constituted an improper disclosure of SSI because the media person to whom

this information was disclosed was not a covered person within the meaning of SSI regulations, and the information about RON deployments was protected as SSI. *Id.* On May 10, 2006, the appellant timely filed his petition for appeal. IAF-1, Tab 1.

On August 31, 2006, the agency's SSI Office Director issued a final order (AFO) on SSI related to this appeal, stating in part:

> [I]t is my determination that, on July 29, 2003, the information in question constituted SSI under the SSI regulation then in effect, 49 C.F.R. § 1520.7(j),[] as the information concerned specific FAM deployments or missions on long-distance flights.
>
> . . . .
>
> Pursuant to 49 U.S.C. § 46110, any person disclosing a substantial interest in this Order may, within 60 days of its issuance, apply for review by filing a petition for review in an appropriate U.S. Court of Appeals.

IAF-1, Tab 22, Attachment. The AFO explained through a footnote that on May 18, 2004, the agency recodified section 1520.7(j) at section 1520.5(8)(ii). *Id.*

The text of 49 C.F.R. § 1520.7(j)[1] in effect at that time, current through October 1, 2003 defined SSI as follows:

---

[1] Under 49 C.F.R. § 1520.5(b)(8)(ii), information concerning deployments, numbers, and operations of FAMs is considered SSI.

> Specific details of aviation security measures whether applied directly by the TSA or entities subject to the rules listed in § 1520(a)(1) through 6. This includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.

See IAF-1, Tab 4, Subtab 4M.

In granting the appellant's request for a dismissal without prejudice, the ID stated:

> After the action was taken and the appellant filed his appeal, the agency issued a "Final Order" dated August 31, 2006, determining that the appellant's disclosure is covered under the regulation at issue. A right of review is provided in the U.S. Court of Appeals pursuant to 49 U.S.C. § 46110.

IAF-1, Tab 29. The ID explained that the appellant intended to pursue such a review, and the appellant's appeal was dismissed without prejudice to refiling. *Id.* The ID thereafter became the final decision of the Board. *See id.*

On September 16, 2008, the U.S. Court of Appeals for the Ninth Circuit ruled on the appellant's petition for review of the AFO. *MacLean v. Department of Homeland Security*, 543 F.3d 1145 (9th Cir. 2008). In denying the appellant's petition through this *per curiam* opinion, the 9th Circuit wrote, in part:

> In late July, 2003, while working as a Federal Air Marshal in Nevada, MacLean received a text message on his government-issued cell phone stating

that "all RON (Remain Overnight) missions . . . up to August 9th would be cancelled." This message indicated to MacLean that there would be no Federal Air Marshals on overnight flights from the time of the text message up to August 9, 2003. MacLean believed that the cancellation of these missions was detrimental to public safety. He raised this concern with his supervisor,[] who did not make further inquiry. MacLean then attempted unsuccessfully to alert the Office of Inspector General. On July 29, 2003, MacLean disclosed the text message to members of the press. The Federal Air Marshal Service later confirmed that the text message's contents did not reflect a final decision of its director and there was no cancellation of overnight missions.

. . . .

Pursuant to 49 U.S.C. § 46110(c), we have jurisdiction to review only final agency "orders". . . . . We have jurisdiction to review the TSA-order.

. . . .

Section 1520.7(j) (2003) designates as "sensitive security information . . . [s]pecific details of aviation security measures . . . applied directly by the TSA . . . [which] includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." Information falling within this designation is *automatically considered* "sensitive security information" without further action from the TSA, 49 C.F.R. § 1520.7 (2003). The TSA has authority to

designate information as "sensitive security information" pursuant to 49 U.S.C. § 114(s) and 49 C.F.R. § 1520.

[] The information contained in the text message qualifies as "sensitive security information." The message contained "specific details of aviation security measures" regarding "deployment and missions" of Federal Air Marshals. 49 C.F.R. § 1520.7(j) (2003).

. . . .

MacLean has failed to demonstrate what more the TSA needed to show to support the order. The order is valid

. . . .

The Whistleblower Protection Act does not apply to the order. The order is not a "personnel action," as required by the Act.[] It is merely a determination that [] the text message contained "sensitive security information" pursuant to 49 C.F.R. § 1520.7(j). The fact that the order has some impact on MacLean's proceedings before the MSPB does not convert it to a "personnel action."

. . . .

The TSA order does not constitute a retroactive agency adjudication. Rather, the agency applied regulations that were in force in 2003 to determine that information created in 2003 was "sensitive security information." . . . The TSA order comports with the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place."

Id. (italics added). On October 15, 2008, the appellant timely refiled this appeal, and the Board assigned this appeal the second administrative judge. IAF-2, Tabs 1, 2. It is undisputed that at the time of the events at issue, inclusive of the specification before the Board, the appellant was assigned to the FAM service center in Las Vegas, Nevada. *See* IAF-2, Tab 45, Exhibit X; IAF-2, Tab 49, Exhibit PPP.

On February 10, 2009, the second administrative judge granted a motion to certify specific rulings for interlocutory appeal as follows. IAF-2, Tab 23. The issues were: (1) whether the Board has the authority to review the determination by the agency, and affirmed by the Ninth Circuit, that the information the appellant disclosed constituted SSI; (2) whether the fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him has any effect on the issue in (1), above; and (3) whether a disclosure of information that is SSI can also be a disclosure protected by the Whistleblower Protection Act (WPA).

On June 22, 2009, the Board issued its Opinion and Order, ruling on the above enumerated items as follows. *MacLean v. Department of Homeland Security*, 112 M.S.P.R. 4 (2009). In addressing question (1), the Board held that under the facts of this appeal, the Board does not have the authority to review the agency's SSI determination because the Ninth Circuit has issued a decision upholding the agency's determination. *Id.* at 11. For question (2), the Board explained that the timing of the AFO did not alter its

conclusion on question (1) because Congress provided individuals a judicial mechanism to challenge the SSI determination through the U.S. Court of Appeals, and the appellant actually availed himself of that opportunity. *Id.* at 12. The Board continued, explaining that the grant of exclusive jurisdiction in Federal court was triggered in this particular case, therefore, the Board lacks authority to review the agency's determination on this matter. *Id.* On question (3), the Board found that a disclosure in violation of the regulations governing SSI is prohibited by law within the meaning of 5 U.S.C. § 2302(b)(8)(A) and cannot give rise to whistleblower protection. *Id.* at 18.

On July 13, 2009, the second administrative judge scheduled a status conference to address the adjudication schedule for this matter IAF-2, Tab 29. On July 22, 2009, prior to this status conference, this case was reassigned to a third administrative judge. IAF-2, Tab 31.

On September 22, 2009, the parties appeared for a prehearing conference. IAF-2, Tab 59; *see* IAF-2, Tabs 73, 75. At the request of the appellant, the hearing and the remainder of the prehearing conference were delayed. *Id.* The hearing was thereafter further delayed at the request of the agency, then convened on November 5, 2009 as described above. IAF-2; Tabs 62, 75; HCD. On November 16, 2009, the parties filed their closing arguments and the record was closed for all matters. HCD; IAF-2, Tabs 77-79.

On February 23, 2010, the appellant moved to reopen the record to receive additional evidence identified

as newly discovered evidence. IAF-2, Tab 80. Through this motion, the appellant argues that on February 17, 2010, the agency's Office of the Inspector General (OIG) issued a report on the breach of SSI finding that the agency's Office of SSI violated many of its own SSI policies, resulting in the unauthorized release of SSI, without appropriate redaction. *See id.* The appellant argues that this evidence is material because the Office of SSI "cannot follow its own directives" then he should not have been removed as a FAM for the charge at issue. *Id.* The appellant adds that the controls for SSI were found to be defective and deficient creating inconsistency and confusion. *Id.* In response, the agency opposed the appellant's motion to reopen the record, arguing that the proffer is procedurally defective, untimely filed without good cause, speculative, and irrelevant. IAF-2, Tab 81. The agency argues that the OIG report involved "inadvertent" disclosures of SSI while the charged misconduct at issue involves an intentional disclosure. *Id.* The appellant thereafter replied to the agency's response, arguing that the OIG report was issued after the close of the record, and that it is relevant to the appellant's argument that the appellant acted in good faith under rules that were inconsistent and confusing. IAF-2, Tab 82. Through his reply, the appellant correctly points out that the "charge at issue[,]" distinct from the penalty consideration, "does not allege that Mr. MacLean intentionally disclosed SSI information[.]" *Id.* In responding to the appellant's reply, the agency argued the OIG report did not involve any law enforcement officers, and that the scope of the

report did not include any disciplinary actions. IAF-2, Tab 83. The agency further adds that the appellant's charged misconduct differs from using "the use of computer-made redactions that failed to conceal SSI permanently." *Id.*

In addressing another point through his underlying motion, the appellant states that Mr. Donzanti has, since the time of the actions at issue, been demoted to Deputy SAC, adding that Mr. Donzanti "is alleged by several current and former Los Angeles Federal Air Marshals" to have a past agreement with the Director of the agency's FAM Service (Director), based on "an illicit affair" with a subordinate FAM who was previously assigned to headquarters (subordinate FAM). IAF-2, Tab 80. The appellant explains that in 2004, under an agreement between Mr. Donzanti and the Director, the subordinate FAM was transferred from headquarters to Los Angeles and no disciplinary action taken against Mr. Donzanti, in exchange for Mr. Donzanti terminating the appellant at the direction of the Director. *Id.* The appellant argues that this 2004 agreement between Mr. Donzanti and the Director allowed the agency to issue the 2006 decision on the appealed removal at the field level, rather than the headquarters level. *See id.* In addition to the opposition above, the agency argues that the appellant could have introduced and/or cross examined Mr. Donzanti about these 2004 matters at the hearing, adding that the appellant deposed Mr. Donzanti in 2006. IAF-2, Tab 81. Through his reply, the appellant argues that the information about Mr. Donzanti is relevant to showing that Mr. Donzanti acted to ensure

his professional survival. IAF-2, Tab 82. Through its response to the reply, the agency argues that the motion on this issue is speculative and irrelevant. IAF-2, Tab 83.

While I have no reason to doubt that there have been subsequent breaches of SSI procedures by the agency employees as alleged, it is unclear how showing the occurrences of other such events constitutes good cause for reopening the record, in light of the fact that the evidence does not address what disciplinary actions or penalties, if any, were taken against or imposed on any agency employees, and the fact that the evidence does not affect whether or not the charged misconduct occurred.

With respect to the allegations involving Mr. Donzanti's change from SAC to Deputy SAC, and his interactions with the agency's headquarters personnel, the appellant fails to explain why these matters are being raised following the close of the record, since the appellant could have elicited testimony about these specific topics during Mr. Donzanti's deposition and/or during the hearing, prior to the record closing. *See* HCD. Specifically, in addition to having the opportunity to depose Mr. Donzanti, the appellant had a subsequent opportunity to question Mr. Donzanti about these matters at the hearing including his service as a Deputy SAC at the hearing:

> JUDGE KANG: Please state your full name for the record, spelling your last name.

THE WITNESS: Frank Joseph Donzanti, D-o-n-z-a-n-t-i.

JUDGE KANG: Mr. Donzanti, please state your current position and title for the record.

THE WITNESS: I am the Deputy Special Agent in charge of the Los Angeles Field Office for the Federal Air Marshal Service.

HCD. With regard to the role of headquarters and/or the Director, including the headquarters Policy Compliance Unit (PCU), the appellant's attorneys questioned Mr. Donzanti as follows:

Q. And did you work on this removal letter with anyone from—from Headquarters?

A. To some extent I may have had some impact. I don't remember exactly what it was. But most of the letter was drafted by Headquarters personnel. And that would be in HR, Human Resources.

Q. During—thank you. And during the entire process of deciding what to do about Mr. MacLean, did you work with the Policy Compliance Unit at Headquarters?

A. Yes, I did.

Q. And who were the—who was the supervisory official there that you worked with?

A. I believe it was—[BB] was the SAC at the time and [MM] was one of the ASACs.

Q. And who did [BB] report to?

A. At that time I'm not—I'm not sure who he reported to.

Q. So you don't know whether he reported to the Director or not?

A. It wouldn't be the Director. He would have reported to a Deputy Assistant Director, which one I'm not sure of.

Q. So it would have been either [the] Director [] or Director[]'s Assistant?

A. No, what—

Q. Is that correct?

A. I could explain it. You have a—you have a Director, you have a Deputy Director. Then you have an Assistant Director. Then you have a Deputy Assistant Director. So this person would be about four levels down the food chain.

MR. DEVINE: No further questions, Your Honor.

Id. In reviewing the appellant's arguments on these matters, the appellant fails to adequately explain why he could not have probed, elicited, or otherwise introduced these matters now raised, prior to the record closing. For the reasons set forth above, the appellant fails to show good cause for granting his motion on any of the bases raised, whether considered individually or in combination with one another. For these reasons, the appellant's motion to reopen the record is DENIED.

The Charge

As set forth above, the sole charge before the Board is Unauthorized Disclosure of SSI. IAF-2, Tab 67 at 5-6. To prove this charge, the agency must show that the appellant engaged in the conduct with which he is charged. *See, e.g., Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 201-205 (1997) (charge must be construed in light of accompanying specifications).

The underlying specification contains background information and alleges that on July 29, 2003, the appellant informed the media that all Las Vegas FAMs were sent a text message on their government issued mobile phones that all RON missions up to August 9th would be cancelled, or words to that effect, and that this constituted an improper disclosure of SSI because the media person to whom this information was disclosed was not a covered person within the meaning of SSI regulations, and the information about RON deployments was protected as SSI. IAF-2, Tab 67 at 5-6.

The Appellant's Testimony Regarding Training on Sensitive Information and SSI

In addressing this charge, the appellant testified that in November 2001, he attended FAM training. HCD. The appellant testified that during this month long training, the term "sensitive information" was used to describe flight times, flight numbers, and airline information. *See id.* In the months following the November 2001 training, the appellant testified

that he reviewed "a very thick pamphlet of a policy going into—into detail of—of what was SSI." *Id.*

When asked about the vacancy announcement and the conditions of employment for his FAM position, the appellant testified that he knew that disclosing of sensitive information was a basis for removal. *See id.* The appellant testified that in 2002, the issue of SSI was further addressed in training, stating:

> I signed a statement acknowledging that I—I attended a SSI training and read the—read the policy.

Id. The appellant further testified:

> Well, there were—there were a lot of publications that we were—that we were given. I—I don't remember exactly, but I believe there was a—there was a master—there was a master folder that had probably a quarter-inch thick of—of SSI policies, just very wordy. And you had to—you had to sign a acknowledgement that you—you—you read the policy and understood it.

Id. In explaining the 2002 training, the appellant testified:

> We were—we were distributed a list of—of issues that you just didn't—you didn't discuss, such as we were—we were given scenarios saying that some Air Marshals in the past had gotten in trouble for telling their significant others where to pick them up exactly, which gate, and which airline they were flying. It said a lot of guys have been—gotten in

> trouble and were *fired* for that, so you want to completely avoid it.

Id. (emphasis added). The appellant continued:

> So if somebody needs to pick you up from the airport, you need to give them a window and tell them, for instance, a baggage claim area, not an exact flight number and airline that they'll be—you'll be flying in on.
>
> . . . .
>
> The training was done in sort of hypothetical situations. If—if you needed somebody to pick you up from the airport, you—you had them wait for you in the baggage claim. You do not tell them the flight number that you were arriving on, or did you tell them origins, destinations of—of a particular flight because the big issue there was a lot of Air Marshals had gotten into a lot of hot water for telling people the flight numbers and the flight times of certain plane flying that—that they were going to come into.
>
> . . . .
>
> So it was very, very clear that you did not tell flight numbers and times of the flights you flew missions on.

Id. When asked about the known absence of FAMs on a particular flight, the appellant testified:

> If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific flight.

Id.

The Appellant's Testimony Regarding the Text Message

The appellant testified that FAMs at that time were issued an encrypted password protected personal digital assistant (PDA) and a Nokia cell phone that the appellant believed was neither encrypted nor password protected in the same way as the PDA. *Id.*

The appellant testified that between July 26-28, 2003, "everybody in the country had received a text message to the Nokia phones" as follows:

> And the message simply stated that all overnight missions were going to be canceled—no—and you needed to can- —you needed to cancel your hotel reservations and call the office to get new schedules.

Id. The appellant testified that he did not understand this information to be SSI because the text was sent to his government issued cell phone rather than his PDA, explaining that while both devices were capable of handling text messages:

> I figured if—if they weren't going to send—if they didn't send text messages to the plain Nokias, if it was sent to the PDA, I assumed that it is more sensitive—it has some sensibility [sic] to it.

Id. The appellant further explained:

It—not only—it was—not only it didn't have any markings, SSI markings, not even a warning that this—don't disseminate this or—it had—it had nothing on there. It was just a—it was just a plain message.

Id.

The Appellant's Testimony Regarding OIG and the Reporter

In explaining the context of this point in time and his decision to call OIG, the appellant testified that FAMs had "just gotten the—this suicide hijacking alert that was issued" and that he and other FAMs were taking issue with the agency's dress code and grooming standards policy. *Id.* The appellant testified that he learned that the decision to cancel RON missions was one made at the headquarters level. *Id.* The appellant testified:

> It just seemed that the—the Agency had—had either lost control or was just making a grave mistake. And I decided, well, I'll try the OIG.

Id. The appellant testified that when he spoke with an OIG Special Agent (SA), the OIG SA informed him "there's nothing that could be done." *Id.* The appellant continued:

> And so it looked like it wasn't going anywhere. And after I hung up, I kind of stewed on this thing. And I decided to make a phone call to a reporter that had been doing some good reporting on—on TSA. I thought he wrote—wrote some very responsible articles
>
> . . . .
>
> I told him that there—there was a plan to remove Air Marshals off of all long-distance flights, and this was right after we just got our—our suicide hijacking briefings.

. . . .

> And the information, I believe, was—may have been potentially harmful had this plan ever gone into effect. I didn't think it was illegal, but I thought that what was happening was illegal and dangerous to the—to the public.
>
> . . . .
>
> There was—yeah, I believe there was—there was a very good possibility that he would have made it public. . . . . I didn't know the story was going to be as big as it was.

Id.

When asked about the specifics of his conversation with the reporter in relation to the specification before the Board, the appellant responded to the agency's questions as follows:

> Q. When you spoke to [the reporter] and disclosed the information to him, you told him that RON missions out of Vegas were being canceled; isn't that right?
>
> A. No, I did not.
>
> Q. You were specific to identify that the text messaging went to the Vegas Field—Federal Air Marshal; isn't that right?
>
> A. No, ma'am. Not at all.
>
> Q. You identified yourself as being from the Las Vegas Field Office; isn't that right?

A. Can I see the exhibit? I don't remember if I was identified as a Las Vegas Federal Air Marshal.

Q. You don't remember identifying yourself as coming from Las Vegas when you were talking about these—

A. I don't remember. I thought you were referring to the article.

Q. I'm referring to your discussions with Mr. Meeks.

A. I—I don't remember if I told him I was—I was based in Las Vegas or not.

Q. But you told him that the text messaging went to officers from Las Vegas Field Office; isn't that right?

A. I don't remember saying specifically Las Vegas, because I knew there were Air Marshals across the country that were getting the same message.

Q. In fact, that's what you also told the investigator at the time that the Office of Professional Responsibility was looking into it; isn't that right?

A. Can I—can I re- —I don't know that verbatim. If that's the- —if that's what the affidavit states, I —I need to read it. I don't know specific—I do not know from memory if I told anybody—if I stated that I—I identified to [the reporter] that it was Las Vegas Air Marshals.

Id. Upon redirect by his counsel, the appellant testified as follows:

> Q. Are you aware whether there are any other sources of information to Mr. Meeks in his various articles other than yourself?
>
> A. Yes. His [the reporter's] subsequent article stated there was more than one source, and he sent me and my attorney, my former representative in this case, that there were—there were more than one. So there were three sources that he—that he spoke to.

Id.; IAF-2, Tab 63, Exhibit RRR (email from the reporter to the appellant's attorney submitted by the appellant). Through his testimony and the referenced email, the appellant appears to challenge the specification at issue in this charge. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

In observing the appellant's testimony at the hearing, I found the appellant to be evasive, nuanced, and inconsistent. *Id.* Throughout his testimony, the appellant insisted that he did not believe that the text message above constituted SSI or was sensitive information because it was delivered to his government issued cell phone rather than his PDA. *Id.*; HCD. However, as set forth above, the appellant also testified that based on his SSI training, he understood that he was to "completely avoid" telling anyone "where to pick them up exactly, which gate, and which airline they were flying" because it could lead one to learn which flight or flights were secured by a FAM or FAMs. *Id.* The appellant then testified that "If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific

flight" because, presumably, this information would lead one to learn that a particular flight was *not* secured by a FAM. *Id.* The appellant's testimony that revealing the presence or absence of a FAM on a particular flight and/or gate in the circumstances above is inconsistent and contrary to his assertion that canceling RON missions for a specified period "was just a plain message" rather the type of message discussed in his SSI training, because such a disclosure necessarily conveys the latter scenario addressed by the appellant above. *Id.* The appellant's assertion that this specific information could not have been sensitive because the text was delivered to his government issued cell phone rather than the PDA, without SSI markings, is inconsistent with his own testimony, and improbable under these circumstances.

Further, the appellant's flat denial that he informed the reporter that RON missions out of Las Vegas were being cancelled is belied by the appellant's sworn and written statement of May 4, 2005, wherein the appellant specified that he informed the reporter that all Las Vegas FAMs were sent a text message to their government issued mobile phones that all RON missions up to August 9, 2003 would be cancelled. *Id.*; IAF-1, Tab 4, Subtab 4J (appellant's affidavit). To the extent the appellant argues that he could not have been the source for the reporter's story because he, as a law enforcement officer, would not break the law to prevent the agency from executing the actions above, which the appellant believed were incorrect, this assertion is also belied by the appellant's affidavit. *Id.* Specifically, the appellant previously stated in a sworn

statement that he had "NO REGRETS or feel NO REMORSE for going to a credible and responsible media representative . . . reporting these gross mismanagement issues has resulted in immediate and positive change in deadly FAMS policies" because his chain of command, OIG, and Members of Congress had "all ignored my complaints[.]" *Id.* The appellant agreed that during his deposition, he testified under oath that it did not matter whether or not the information conveyed to the reporter was SSI. *Hillen*, 35 M.S.P.R. at 458; HCD; IAF-2, Tab 44, Exhibit 8 at 2.

In observing the appellant at hearing, I found that the appellant's attempts to distinguish, explain, and qualify his prior written statements under oath, as well as his deposition testimony, were not persuasive. *Hillen*, 35 M.S.P.R. at 458. Indeed, observing the appellant's hearing testimony highlighted the sentiment expressed by the appellant during his May 4, 2005 interview, and illustrated that the appellant was, to some degree, acting on his frustration with OIG and his superiors, in conveying information to the reporter, rather than a belief that the text message at issue was not SSI as stated at the hearing. *Id.* For these reasons, to the extent the appellant now denies that he conveyed the information specified above involving RON missions out of Las Vegas, I find that the appellant's testimony to this effect is not creditable. *Id.*

Based on a careful review of the record evidence, in particular the sworn statement and testimony of the appellant, I find that the agency has shown by preponderant evidence that on July 29, 2003, the appellant

informed the reporter that all Las Vegas FAMs were sent a text message on their government issued mobile phones that all RON missions up to August 9th would be cancelled, or words to that effect. *Hicks v. Department of the Treasury*, 62 M.S.P.R. 71, 74 (1994). With respect to the characterization of this information, the Ninth Circuit has ruled that the information contained in the text message qualifies as SSI because it contained specific details of aviation security measures regarding deployment and missions of FAMs. *Id.; MacLean*, 543 F.3d 1145. Accordingly, I find that the agency has met its burden of proving by preponderant evidence that information on RON deployments at issue was SSI; I further find that the agency has met its burden of proving by preponderant evidence that the information disclosed by the appellant to the reporter on July 29, 2003 was SSI. *Id.*

With respect to the reporter's status, the appellant does not dispute that if the information at issue was SSI, the reporter was not authorized to receive this information. *See* HCD (testimony of the appellant). Within the agency's SSI regulations, the agency has shown, and the appellant has not disputed, that the reporter was not a person with a "Need to Know" within the meaning of the Interim SSI Policies and Procedures in effect as of November 13, 2002. IAF-1, Tab 4, Subtab 4N. Accordingly, I find that the agency has shown by preponderant evidence that the media person to whom the SSI was disclosed, was not a covered person within the meaning of SSI regulations. *Hicks*, 62 M.S.P.R. at 74. Because this person was not authorized to receive this SSI, I find that the agency

has shown by preponderant evidence that the disclosure of the SSI by the appellant to the reporter was unauthorized. *Id.*

For the above reasons, I find that the agency has proven the factual assertions as set forth in the specification underlying this charge. The specification is SUSTAINED. I further find that the agency has shown by preponderant evidence that the appellant engaged in the unauthorized disclosure of SSI as charged. *Id.; see, .e.g., Otero*, 73 M.S.P.R. at 201-205. The charge is SUSTAINED.

Affirmative Defenses

The appellant has the burden of proving his affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(a)(2)(iii). Following a discussion with the appellant's attorneys about the affirmative defenses in this appeal, the appellant clarified that he was alleging that the agency discriminated and retaliated against him based on his membership and leadership status with a professional association[2] (PA) for other than merit reasons in violation of 5 U.S.C. § 2302(b)(10); and that this alleged discrimination and retaliation violated his First Amendment rights. No other affirmative defenses are alleged in this appeal. IAF-2, Tab 67 at 5-6.

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[2] It is undisputed that the appellant does not belong to a recognized union, and that none of his activities in a professional association constituted protected union activities. IAF-2, Tab 67 at 5-6 (prehearing conference summary with the appellant's attorneys and an agency representative).

The Appellant's Claim Under Section 2302(b)(10)

Section 2302(b)(10) prohibits discrimination for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others. The appellant argues that the agency took the actions at issue in this appeal based on his service with a chapter of the Federal Law Enforcement Officers Association (FLEOA). The appellant specifies that approximately one month after conveying the information to the reporter as set forth in the specification discussed above, he began working on the Federal Air Marshal Service (FAMS) chapter of the FLEOA, thereafter serving as the chapter's executive vice president as follows:

> About two to three weeks af- —I'd say about—about a month after I made my July 2003 disclosure, I began to organize the—and I cofounded the Federal Air Marshal Service Chapter within the Federal Law Enforcement Officers Association.

HCD (testimony of the appellant). The appellant testified that he "became a hot target for—by Headquarters" because he was the "number-two guy" in the chapter. *Id.* In discussing the OPR investigation underlying the charge and specification, the appellant testified as follows based on questions posed by his attorneys:

> Q. Well, okay. So after the disclosure did you become aware that there was an investigation at some point, whenever it was?

A. Yes.

Q. How long after the disclosure was there an investigation?

A. Approximately 13—13 months.

Q. Okay. And—

A. I'm sorry. That's—that's incorrect. I had no —it would have been—it would have been approximately 23 months, 22 months when I knew there—I was under investigation for the—for the SSI disclosure.

Q. Okay. And when you first became aware of the investigation; was it for the SSI issue or were there other issues that you—that were involved?

A. Well, the investigation initially was started because of my appearance on [an evening national network news program]. And I was told by a supervisor in the field office that the Special Agent in Charge has begun an investigation to find out who was the Air Marshal on that program.

Q. Okay. And how soon after your appearance on that program that you became aware that you were the subject of an investigation?

A. Within days.

Q. Okay. And what did you understand the scope and the issues in that investigation were, initially?

A. They just wanted to know who was—it—it was —it was impossible any sensitive security information or classified information was divulged during my interview, so—

Q. With [the national network news anchor]?

A. That's correct.

Q. Okay.

A. It was just who find—just to find out who was —who was on the [evening national network news] program.

Q. Okay. And during the course of that investigation did there come a time when you informed the investigators that you—you had disclosed this information that the Agency considers to be SSI?

A. Yes. Approximately seven months later in May of—early May, the Of- —the Immigration and Customs Enforcement, Office of Professional Responsibility, ICE OPR, the investigators came in and gave me a pep talk, saying, "Be completely and fully forward here. You do not want to lie to us,"—

Q. Um-hum.

A. —"because we will find out. So you need to tell us everything."

Q. And they asked you about that?

A. They asked me if I was the person, and I said yes.

Q. Um-hum.

Id. In relating his FLEOA activities to the investigation and OPR[3] interview, the appellant testified that he became involved in creating the FAMS chapter of FLEOA approximately two to four weeks after disclosing the SSI because "I figured the best way to start addressing these problems was in a collective voice. . . . And that's where things started getting very hectic." HCD.

When asked about his involvement with FLEOA, Mr. Donzanti testified that while he did not recall whether he was a member "on that exact date[,]" he has been a member of FLEOA for 25 years. HCD. To the extent the appellant argues or implies that Mr. Donzanti manipulated the ICE OPR ROI, it is undisputed that Mr. Donzanti did not speak to any of the individuals conducting the investigation and/or writing the ROI at issue. *Id.* (cross examination of Mr. Donzanti by the appellant). Further, there is nothing in the record to indicate that Mr. Donzanti or anyone else in FAMS had the ability to manipulate an active ICE OPR investigation and/or manipulate an actual OPR ROI. *See id.*

While the appellant's involvement in FLEOA did indeed precede the investigation and OPR actions, the appellant's testimony at hearing reflects that his unauthorized appearance on a national network news program, rather than his FLEOA activities, was the

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[3] It is undisputed that ICE, rather than TSA, conducted the underlying investigation and wrote the ROI at issue. *See* HCD (testimony of Mr. Donzanti and the appellant).

catalyst the OPR's investigative actions including the ROI and investigative interview. *See* HCD. Specifically, even though the appellant asserts that he become a "hot target" after he began organizing and leading a chapter of FLEOA in or about August 2003 as set forth above, the appellant himself points out that the investigative actions did not occur until approximately 22 months after he began organizing and leading the chapter. *See id.* To the extent any particular event served as the catalyst for the OPR investigative actions and ROI, the appellant testified that the investigation was started "within days" of his unauthorized appearance on an evening news program, specifying that it was "started because of my appearance" on the evening national network news program. *Id.* After carefully reviewing the record evidence, including the matters discussed above, I find that the appellant has failed to show by preponderant evidence that the agency discriminated and retaliated against him based on his membership and leadership status with the FLEOA. I further find that the appellant has failed to show by preponderant evidence that the agency took the actions at issue in this appeal based on his membership and leadership in FLEOA. IAF-2, Tab 67 at 5-6.

Appellant's First Amendment Claim

The Supreme Court has recognized that public employees, like all citizens, enjoy a constitutionally protected interest in freedom of speech. *Connick v. Myers*, 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563,

568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Smith v. Department of Transportation;* 106 M.S.P.R. 59, 78-79 (2007). Employees' free speech rights must be balanced, however, against the need of government agencies to exercise "wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Mings v. Department of Justice,* 813 F.2d 384, 387 (Fed. Cir. 1987) (quoting *Connick.* 461 U.S. at 146). Thus, in determining the free speech rights of government employees, a balance must be struck between the interest of the employees, as citizens, in commenting on matters of public concern, and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering,* 391 U.S. at 568; *Mings,* 813 F.2d at 387; *Sigman v. Department of the Air Force,* 37 M.S.P.R. 352, 355 (1988), *aff'd,* 868 F.2d 1278 (Fed. Cir. 1989) (Table). In addressing the issue of whether employee speech is protected by the First Amendment, the Board must determine: (1) whether the speech addressed a matter of public concern and, if so, (2) whether the agency's interest in promoting the efficiency of the service outweighs the employee's interest as a citizen. *Smith,* 106 M.S.P.R. at 79.

In this case, the agency argues that the appellant's disclosure of SSI does not meet the first prong of the test above because exact nature of any particular deployment or mission is not a matter of public concern. IAF-2, Tab 77. While this argument may apply to a specific mission, the communication at issue involved the potential cancellation of all RON missions out of

Las Vegas within the context of a flying public that feared another terrorist attack involving commercial aviation aircraft. *See* HCD (testimony of the appellant and Mr. Donzanti). The potential presence of, or known lack of presence of FAMs on specific types of flights is understandably a matter of public concern because it affects the chances that a terrorist will target the specific flights at issue; in this case, the disclosed SSI directly involved such information. *See id.* Accordingly, I find that the appellant's disclosure at issue satisfies the first prong of this test.

Citing *Pickering*, 391 U.S. at 568, the appellant argues that the information conveyed by the appellant did not cause any harm to the agency mission; rather, the appellant asserts that his actions increased the efficiency of the service in that his disclosure of SSI addressed a vulnerability to aviation security. IAF-2, Tab 79. The appellant argues that the cancellation of RON missions at issue was "illegal and seriously threatened America's national security[.]" *Id.* The appellant argues in the alternative that even if TSA had not changed its decision on the RON missions, "the threat would have been minimized by the advance nature of the disclosure six days before the policy was scheduled to take place." *Id.* The appellant argues that based on the second prong of the balancing test, the agency's action must be barred as a matter of law. *Id.;* IAF-1, Tab 4, Subtab 4C.

In addressing this issue of whether the agency's interest in promoting the efficiency of the service outweighs the employee's interest as a citizen, Mr.

Donzanti testified as follows upon questioning by the appellant's attorneys:

> Q. Was there any actual harm from Mr. MacLean's disclosure?
>
> A. There could have been. From my perspective, I—I know that the division that—
>
> Q. Excuse me, sir. I didn't say "could have." Was there any actual harm? Do you know of any?
>
> A. Well, I'm going to explain that in a minute. We have a division that schedules flights. And in light of that disclosure that Mr. MacLean made, now they would have to do excessive work to either correct that or make some decisions. It would be conversations, and it would be work lost. And ultimately some kind of risk associated with the fact that the people that are scheduling flights and—and looking at intelligence are now busy rescheduling flights or doing whatever they had to do to kind of make a correction here with this vulnerability that now existed.

HCD. Further addressing the effect of the appellant's disclosure on the efficiency of the FAMS and its mission to protect flights, Mr. Donzanti testified:

> Well, he gave information on our—on our flights, a particular group of flights that were not covered, which created a vulnerability. As soon as he gave that information out to the media, it *created* a vulnerability within the aviation system. And it set us up for a possible another 9/11 incident.
>
> . . . .

> "How so?" Well, it gave people that would want to do us harm information that certain flights weren't covered by Air Marshals. And if you look at that, it makes the system vulnerable, especially with flights leaving out of Las Vegas, knowing that certain flights aren't covered, long-distance flights are not being covered by Air Marshals.

Id. (italics added). At the heart of this question is whether the vulnerability at issue is the absence of FAMs on RON missions out of Las Vegas, or the appellant's disclosure of this specific facet of Las Vegas FAM deployments for a specific forward date; for the reasons that follow, I find that the latter was applicable.

This matter of FAM deployments is directly related to the FAMS and TSA core mission because the potential and actual presence of one or more FAMs on any particular flight or class of flights is a critical deterrent and/or countermeasure for a terrorist high jacking commercial passenger aircraft. HCD (testimony of the appellant and Mr. Donzanti). Related to this point, the ability to deploy without being readily identified on sight by other aircraft passengers is an important factor in a FAM's effectiveness, because of the positive uncertainty that is then created on flights that are not actually protected by one or more undercover armed FAMs. *See, e.g.*, HCD (testimony of the appellant). Conversely, as pointed out by the appellant:

> If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific flight.

HCD (testimony of the appellant).

In this case, the agency appears to agree with the appellant's assertion that his disclosure did not harm the Las Vegas RON flights at issue, and explains what steps were taken to directly address the RON missions for the specific period at issue. *See* HCD (testimony of Mr. Donzanti). Indeed, I have no reason to doubt that the appellant's disclosure at issue improved FAM presence on Las Vegas RON flights up to August 9, 2003, based on the undisputed fact that agency resources were then reallocated to some degree to address these specific Las Vegas RON flights. *See id.* However, it is this allocation of resources within the mission of the FAMS and the TSA, and the inability to cover every commercial passenger flight that remains at issue. *See id.*

As pointed out by Mr. Donzanti, the deployment of FAMs is driven by factors, including "intelligence" gathered and considered. *See id.* While the appellant's actions may have indeed strengthened FAM presence on the Las Vegas RON mission flights as asserted, it was counter to the agency's interest in promoting the efficiency of the service because, in addition to considering "intelligence" and other factors, the agency was compelled to shift resources, explaining, "in light of that disclosure that Mr. MacLean made, now they would "have to do excessive work to either correct that or make some decisions." *Id.* Specifically, given the limited number FAMs both in Las Vegas within the broader agency, and given the presumably finite resources of FAMS, TSA, and the

broader agency, the agency correctly points out that the result of this disclosure that there would be no FAMs on forward RON missions out of Las Vegas for the period specified, forced the agency to shift resources to address this disclosure. *See id.* In addressing this issue, Mr. Donzanti further explained, "the people that are scheduling flights and—and looking at intelligence are now busy rescheduling flights or doing whatever they had to do to kind of make a correction here with this vulnerability that now existed." *Id.*

This issue of limited resources and/or inability to staff all commercial passenger flights at all times nationwide and/or worldwide with armed FAMs is what makes FAM deployment a matter of import. *See* HCD (testimony of the appellant). The importance of protecting FAM deployment information in light of the reality that not all commercial passenger flights are protected by armed FAMs was acknowledged to some degree by the Ninth Circuit while adjudicating the petition for review of the SSI AFO at issue:

> Section 1520.7(j) (2003) designates as "sensitive security information . . . [s]pecific details of aviation security measures . . . applied directly by the TSA . . . [which] includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." Information falling within this designation is *automatically* considered "sensitive security information" without further action from the TSA. 49

> C.F.R. § 1520.7 (2003). The TSA has authority to designate information as "sensitive security information" pursuant to 49 U.S.C. § 114(s) and 49 C.F.R. § 1520.
>
> The information contained in the text message qualifies as "sensitive security information." The message contained "specific details of aviation security measures" regarding "deployment and missions" of Federal Air Marshals. 49 C.F.R. § 1520.7(j) (2003). That there could have been more specific information in the message does not undermine this determination. *See id.*

MacLean, 543 F.3d 1145 (italics added). While I have no reason to doubt the appellant's assertion that he took these actions to benefit the nation and to increase the efficiency of the service, I find that the appellant's actions undermined the efficiency of the service for the reasons discussed above.

Following a careful review of the record evidence, I find that the agency's interest in promoting the efficiency of the service outweighs the employee's interest as a citizen. *See Smith*, 106 M.S.P.R. at 79. To the extent the appellant maintains that the agency violated his First Amendment right of free association based on his contacts with the media, I find that the agency took these actions not for associating with the reporter, but for the conduct as charged and sustained above, pursuant to the findings and discussion above. *Broadnax v. Department of Transportation*, 15 M.S.P.R. 425 (1983); *Isoldi v. Department of Transportation*, 16 M.S.P.R. 471 (1983). To the extent the appellant

maintains that the agency violated his First Amendment right of free association based on his involvement in the FLEOA, I find that the agency took these actions not for associating with this PA, but for the conduct as charged and sustained above, pursuant to the findings and discussions above, including the findings and discussions of the appellant's claim under section 2302(b)(10). *Id.* Consequently, the appellant's affirmative defenses are not sustained.

Nexus and Penalty

When such charges of misconduct are sustained by preponderant evidence, the agency must show that there is a nexus between the sustained charges and either the employee's ability to accomplish his duties satisfactorily or some other legitimate government interest. *See Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), *modified, Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75 n.2 (1987). Here, there is clearly a direct relationship between the appellant's conduct as described in the charge above, and the appellant's workplace, because all of the appellant's actions were enabled by his position as a FAM, and directly impacted the mission of his workplace, FAMS, TSA, and the agency. To this point, Mr. Donzanti testified that it "created a vulnerability" by identifying "a particular group of flights that were not covered[.]" HCD. Mr. Donzanti explained that based on this disclosure, individuals "looking at intelligence are now busy rescheduling flights or doing whatever they had to do to kind of make a correction here with this vulnerability that now existed." *Id.*

Indeed, the appellant testified that if he told someone that a particular flight would not have "any protection on it," that particular flight would be "endangered[.]" HCD. As set forth above, the appellant disclosed SSI in a manner that identified a category of flights from a specific city, thereby "endanger[ing]" those specific flights that are to be protected by this agency. *Id.* Thus, I find that nexus has been established.

Where, as here, all of the agency's charges have been sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). In making that determination, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to insure that management discretion has been properly exercised. *See, e.g., Brown v. Department of the Treasury*, 91 M.S.P.R. 60, ¶ 7 (2002). Thus, the Board will disturb the agency's chosen penalty only if it finds that the agency failed to weigh relevant factors or that the agency's judgment clearly exceeded the limits of reasonableness. *Toth v. U.S. Postal Service*, 76 M.S.P.R. 36, 39 (1997).

The deciding official in this case, Mr. Donzanti, testified regarding his consideration of the *Douglas* factors. HCD. The record reflects that Mr. Donzanti considered the relevant factors, most notably the na-

ture and seriousness of the offense, which involved the FAMS mission of protecting flights, stating:

> [H]e gave information on our—on our flights, a particular group of flights that were not covered, which created a vulnerability. As soon as he gave that information out to the media, it created a vulnerability within the aviation system. And it set us up for a possible another 9/11 incident.
>
> . . . .
>
> Well, it gave people that would want to do us harm information that certain flights weren't covered by Air Marshals. And if you look at that, it makes the system vulnerable, especially with flights leaving out of Las Vegas, knowing that certain flights aren't covered, long-distance flights are not being covered by Air Marshals.

HCD. The agency considered this a serious matter because the disclosure of this specific FAM deployment information directly related to the appellant's duties, position, and responsibilities as a FAM. *See id.*; *see, e.g.*, HCD (testimony of the appellant). With respect to the appellant's argument that no actual harm resulted from the appellant's misconduct because the RON missions were thereafter covered, Mr. Donzanti responded related questions posed by the appellant's attorneys as follows:

> Q. And was there any direct harm from Mr. MacLean's disclosure?
>
> A. It created vulnerability as soon as he made the disclosure. That would be the harm.

Q. Now "vulnerability" is kind of a speculative concept. Was there any direct harm that actually occurred from his disclosure?

MS. CALAGUAS: Objection, move to strike the argumentative comment.

JUDGE KANG: The motion to strike is denied. You know, I'm the Judge here. You don't have to worry about me taking things out of context here. Please repeat your question, Mr. Devine, for clarity.

MR. DEVINE: Yes, sir.

BY MR. DEVINE:

Q. Was there any actual harm from Mr. MacLean's disclosure?

A. There could have been. From my perspective, I—I know that the division that—

Q. Excuse me, sir. I didn't say "could have." Was there any actual harm? Do you know of any?

A. Well, I'm going to explain that in a minute. We have a division that schedules flights. And in light of that disclosure that Mr. MacLean made, now they would have to do excessive work to either correct that or make some decisions.

Id. While the parties disagreed on this aspect of evaluating the seriousness of the misconduct based on how "harm" is defined, the record reflects that Mr. Donzanti considered this factor as more fully discussed in the First Amendment discussion above.

Although this conduct was not frequent or committed for gain, Mr. Donzanti determined that it was intentional because it involved an intentional contact with the reporter, and the conveyance of an intentional statement concerning SSI. *Id.* In describing the clarity of notice, Mr. Donzanti testified that the offense did not involve an obscure security regulation, rather, it was "just very basic[.]" *Id.*

To these points, the appellant argues that he did not intend to disclose SSI, explaining that as a law enforcement officer, he would not break the law in this manner. HCD. However, as noted above, the appellant stated in a sworn statement that he had "NO REGRETS or feel NO REMORSE for going to a credible and responsible media representative . . . reporting these gross mismanagement issues has resulted in immediate and positive change in deadly FAMS policies" because his chain of command, OIG, and Members of Congress had "all ignored my complaints[.]" *Id.;* IAF-2, Tab 4, Subtab 45. Moreover, the appellant acknowledged that during his deposition, he testified under oath that it did not matter whether or not the information conveyed to the reporter was SSI. HCD; IAF-2, Tab 44, Exhibit 8 at 2. To the extent the appellant argues that he was confused as to whether or not this information at issue was SSI, thus did not intentionally convey SSI, because the agency failed to properly transmit this information through the encrypted PDA and/or because the agency failed to transmit the text message with SSI markings as required, and/or because the agency failed to take other precautions as required, I do not

credit the appellant's assertions because the appellant's assertions are not creditable for the reasons set forth below. *Hillen*, 35 M.S.P.R. at 458; *see Hawkins v. Smithsonian Institution*, 73 M.S.P.R. 397, 403-04 (1997).

Throughout his testimony, the appellant insisted that he did not believe that the text message above constituted SSI or was sensitive information because it was delivered to his government issued cell phone rather than his PDA. *Id.*; HCD. However, as set forth above in the discussion of the facts underlying the charge, the appellant also testified that "If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific flight" because, presumably, this information would lead one to learn that a particular flight was *not* secured by a FAM. *Id.* The appellant's testimony that revealing the presence or absence of FAMs on particular flights is inconsistent and contrary to his assertion that canceling RON missions for a specified period "was just a plain message" rather the type of message discussed in his SSI training, because such a disclosure necessarily conveys the type of information described by the appellant as SSI based on his training in 2002, prior to his July 2003 contact with the reporter. *Id.* The appellant's recollections of his training as a new FAM and his subsequent training on SSI in 2002, undermine his assertion that he did not intend to convey SSI, because they evince his understanding that deployment of or the absence of FAMs on particular flights was understood by the appellant to be SSI. *Id.* Based on my, observations of the appellant at the

hearing, and for the reasons set forth above inclusive of the prior credibility determination, the appellant's assertion that he believed that the text involving RONs was "just a plain message" and not SSI, is not creditable. *Hawkins,* 73 M.S.P.R. at 403-04.

Related to this point, Mr. Donzanti explained that the appellant knew that disclosing SSI in this manner was an offense, and that the information at issue "speaks directly to schedules" because it conveys the "mission tempo" and involves the presence of FAMs on types of flights. *See* HCD. In observing the appellant's testimony at hearing, I noted that the appellant's testimony similarly reflected that the appellant was on actual notice about the type of conduct in question, prior to July 2003, as follows:

> We were—we were distributed a list of—of issues that you just didn't—you didn't discuss, such as we were—we were given scenarios saying that some Air Marshals in the past had gotten in trouble for telling their significant others where to pick them up exactly, which gate, and which airline they were flying. It said a lot of guys have been—gotten in trouble and were fired for that, so you want to completely avoid it.

HCD. The appellant also testified:

> If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific flight.

Id. For the reasons explained above and consistent with those findings, I was not persuaded by the appel-

lant's assertion that he had not been warned about the conduct in question. *Hawkins*, 73 M.S.P.R. at 403-04.

To the extent the appellant maintains that the AFO constituted an impermissible retroactive agency adjudication affecting the notice factor, the Ninth Circuit addressed this specific argument:

> The TSA order does not constitute a retroactive agency adjudication. Rather, the agency applied regulations that were in force in 2003 to determine that information created in 2003 was "sensitive security information." This differs from *Bowen*, where the Court held that the Department of Health and Human Services could not apply a new rule requiring private hospitals to refund Medicare payments for services rendered before the rule existed. *See id.* at 208-09, 215-16, 109 S. Ct. 468. The TSA order comports with the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (internal quotation omitted). We reject MacLean's claim.

MacLean, 543 F.3d at 1152. The record reflects that Mr. Donzanti also considered the status of this information as of the date of the disclosure, in considering the intentional nature of the offense and notice, as set forth above. HCD.

In considering the appellant's job level and type of employment, Mr. Denzanti testified that the offense at issue was related to his position as a FAM, because the

appellant was in a public safety position with the responsibility to guard SSI of this sort. *See* HCD. On this point, the Board has previously recognized that law enforcement officers may be held to a higher standard of conduct with respect to the conduct expected of them and the severity of the penalty invoked for failure to meet those expectations. *See Todd v. Department of Justice*, 71 M.S.P.R. 326, 330 (1996).

In addressing the notoriety of the offense, Mr. Donzanti explained that the misconduct brought discredit to the FAMS because it undermined the public's confidence in the agency's ability to prevent a terrorist attack involving commercial passenger aircraft. HCD. Given the importance of the FAM mission, Mr. Donzanti explained that this misconduct went beyond embarrassing the agency, and otherwise explained how the appellant's actions negatively affected the efficiency of the agency's operations. *See id.*

In considering mitigating factors, Mr. Donzanti testified that he considered the fact that the appellant did not act for personal gain. Mr. Donzanti testified that he considered the appellant's lack of prior discipline, his work history, his length of service, and the appellant's satisfactory performance on the job. *Id.* Indeed, Mr. Donzanti testified that the appellant was dependable, showed up for work on time, and that he performed his job "in an exemplary manner[] Minus the incident he had in Las Vegas[.]" *Id.* Mr. Donzanti testified that he also considered the appellant's ability to get along with other employees as a positive factor. *Id.* However, Mr. Donzanti testified that

these mitigating factors did not outweigh the seriousness of this offense. *See id.*

Mr. Donzanti testified that he also considered the appellant's explanation of the mitigating circumstances surrounding the offense as follows:

> He thought there was a vulnerability created in the system when there was—when those types of missions were dropped, when they were not covered. But he is not in a position—he does not have all information. He's not in a position to make that kind of decision. There are other factors that go into that decision he would be unaware of. As he may have good intentions, but he was—he was misguided and didn't have all the information.

Id.

In describing the consistency of the penalty with those imposed on other employees, Mr. Donzanti testified that he was not aware of any similar incidents while he was serving at that duty station as the SAC. *Id.* In *Woebcke v. Department of Homeland Security*, MSPB Docket No. NY-0752-09-0128-I-1, slip op. (Opinion and Order, May 6, 2010), the Board stated that the consistency of the penalty imposed on an appellant may be compared to that of another, even though the two employees are supervised by differing chains of command. In this case, it is undisputed that Mr. Donzanti coordinated w1th the PCU and the headquarters human resources office (HR) in taking this action. HCD (testimony of Mr. Donzanti). Mr. Donzanti testified that PCU serves a coordination role: "They will make sure ·certain entities get information

that's needed." *Id.* In explaining the role of HR in his decision to remove the appellant, Mr. Donzanti explained that although HR drafted text of the decision letter, he reviewed the draft and adopted it, and that he made the ultimate decision to remove the appellant. *Id.*

To the extent the appellant attempted to identify comparators from different chains of command, the appellant argued that he was similarly situated to FAMs A.R., J.S., J.M., but that they received lesser sanctions for their offenses. *See, e.g.*, IAF-2, Tab 39 at 15-16. According to the appellant's submission, A.R. posted on an internet message board that flights were being cancelled on a specified international route. *Id.* The appellant's submissions reflect that the information conveyed to this message board was not learned through any official agency source, rather, the information was "solely the result of second or third hand information FAM [A.R.] had received via the FAM grapevine." IAF-2, Tab 45, Exhibit F. The appellant's submission further stated, "FAM [A.R.'s] only intent in posting the information was to confirm whether the information/rumor he had heard was accurate." *Id.* In contrast to the circumstances surrounding A.R.'s decision to post unverified information to a message board, the appellant's misconduct involved the appellant (a) receiving SSI from the agency on his government issued official cell phone; (b) then verifying the authenticity and accuracy of this SSI by "speaking with the supervisor[;]" (c) then seeking out a well-known reporter; and (d) then disclosing SSI to the reporter. *See* HCD (testimony of the appellant).

Under these circumstances as presented by the appellant, the appellant's offense and that of A.R. are neither the same nor similar. *Cf. Woebcke,* slip op.

With regard to J.S., the record reflects that J.S. improperly identified himself and his partners to aircraft passengers, but was only suspended prior to his resignation. IAF-2, Tab 45, Subtab MM; *see, e.g.*, IAF-2, Tab 39 at 15-16. According to the appellant's submissions, while flying on a mission, J.S. revealed his FAM status and that of his partner to a passenger and information about the next segment of his mission. *Id.* The appellant's submissions reflect that J.S. broke his cover to a passenger seated next to him because the passenger saw that J.S. was carrying a firearm while onboard the aircraft and asked J.S. how J.S. was able to bring a firearm onto a commercial passenger aircraft. *Id.* The appellant's submissions reflect that J.S. revealed his identity as a FAM to avoid a general panic onboard the aircraft, because of the firearm. *Id.* While J.S. may have revealed more information than necessary to this single passenger, the circumstances and nature of the appellant's offense and that of J.S. are neither same nor similar, because, *inter alia*, identifying himself as a law enforcement officer to explain his possession of a firearm during a flight differs from the appellant's decision to share SSI with the reporter as set forth in (a) through (d) above. *See id.* With regard to J.M., the appellant states that J.M. shared his flight information with flight attendants in order to coordinate meetings with these flight attendants in his hotel room, for personal reasons. *See, e.g.*, IAF-2, Tab 39 at 15-16. While J.M.'s actions

likely involved the disclosure of SSI, the circumstances and nature of the appellant's offense and that of J.S.; are neither same nor similar, because, *inter alia*, sharing his flight information with individual airline employees and/or airline flight attendants differs from the appellant's decision to share SSI with the reporter as set forth in (a) through (d) above. *Cf. Woebcke*, slip op. Although the agency did not have a formal table of penalties applicable to the appellant at that time, Mr. Donzanti's testimony reflects that he considered and applied the agency's Interim Policy for Addressing Performance and Conduct Problems effective July 29, 2002, in making his penalty determination, which included consideration of lesser sanctions addressed below. HCD.

In considering the appellant's potential for rehabilitation and the adequacy and effectiveness of alternative sanctions to deter such conduct in the future, Mr. Donzanti explained that while he considered other sanctions, he concluded that no lesser penalty was appropriate based on the seriousness of the offense at issue and because all administrative or law enforcement positions in TSA gives one access to SSI "almost on a daily basis." *Id.* In explaining his conclusion that no alternate sanction or position would be appropriate, Mr. Donzanti explained that the management had "all lost confidence in his ability at that point." *Id.* Mr. Donzanti further explained that in considering the appellant's potential for rehabilitation, the appellant had "no remorse whatsoever." *Id.* Mr. Donzanti's testimony on this point is consistent with the appellant's testimony at the hearing, inclusive of his

testimony regarding his deposition statements, as well as his sworn statement to OPR. *See* HCD.

When asked, by the appellant's attorneys, about the appellant's interim status following the discovery of the appellant's misconduct, Mr. Donzanti testified as follows:

> Q. Okay. Let's continue on this course of whether he was—this issue of whether there was potential for rehabilitation. When did you learn that Mr. MacLean had made an unauthorized release of SSI?
>
> A. Probably sometime in—in July of '05, I believe.
>
> Q. And when did he stop performing his duties as an Air Marshal on your watch?
>
> A. It was October that same year.
>
> Q. Okay. So during that five-month interval did you take any steps to protect the Government against this untrustworthy employee who was on the frontlines of defending against security breaches?
>
> A. It was—it was approximately three months, and not anything that we normally wouldn't do, and he'd be involved in training during that time period.
>
> Q. Did you take any extra precautions? I mean this is untrustworthy agent here who's on the front lines. What precautions did you take to make sure that he didn't endanger our country's security again?
>
> A. Nothing that I can recur [sic] that—additional to training.

Q. Okay. Did you take any action against his security clearance because of the trustworthiness problem?

A. That is not in my purview. So I did not.

. . . .

Q. So did you take any action to have those who are—who do handle those—that type of work to review whether his clearance should be revoked in light of his untrustworthiness?

A. That's done by our Policy Compliant Unit. They handle that. I wouldn't get—

Q. Did you—

A. —involved in it. I—

Q. Did you suggest to the Policy—excuse me. Did you communicate with the Policy Compliance Unit that it might be appropriate for them to consider this?

A. I don't recall.

Q. Okay. Did you engage in any restriction of Mr. MacLean's duties during that interim period?

A. No.

Q. Okay. Let's turn then now to whether or not there was any basis for him to be confused about the status of the information as SSI information.

HCD. Mr. Donzanti explained that at that time, he was not able to accomplish administrative actions as quickly as desired, explaining:

> Things don't happen that fast. We had a very small staff back then. We were still a nascent organization. And it wasn't unusual to take that long.

Id. Although the appellant argues that the approximately three month period above undermines Mr. Donzanti's conclusion on the appellant's rehabilitation potential, the timeline as set forth at the hearing does not support such a finding. *See id.* The record reflects that the SSI disclosure occurred on July 29, 2003, and the testimony above reflects that Mr. Donzanti learned that the appellant was responsible for the SSI disclosure approximately two years later, in approximately July 2005, following the ICE OPR interview. *See id.* Moreover, Mr. Donzanti testified that he did not have the authority to suspend and/or revoke the appellant's security clearance, nor did he believe that he, as the SAC at that time, had the unilateral authority to place the appellant on immediate administrative leave in July 2005 under these circumstances, without following a unspecified "procedure" and process. *Id.* Under these circumstances, it is unclear how the three month gap addressed above evinces an improper consideration of the appellant's rehabilitation potential by Mr. Donzanti. *See id.*

In view of the considerations just cited, I find that the deciding official considered relevant factors and exercised his discretion within tolerable limits of reasonableness. *Douglas,* 5 M.S.P.R. at 306.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: _____

Franklin M. Kang
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **June 16, 2010**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2009 MSPB 114

Docket No.: SF-0752-06-0611-I-2

ROBERT J. MACLEAN, APPELLANT

v.

DEPARTMENT OF HOMELAND SECURITY, AGENCY

June 22, 2009

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶ 1 This case is before the Board on an interlocutory appeal from the February 10, 2009 Order of the administrative judge (AJ) staying the proceedings and certifying for review by the Board his rulings on three issues: (1) Whether the Board has the authority to review the determination by the agency, and affirmed by the U.S. Court of Appeals for the Ninth Circuit, that information

the appellant disclosed constituted Sensitive Security Information (SSI); (2) whether the fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him affects the issue in (1) above; and (3) whether a disclosure of information that is SSI can be a disclosure protected by the Whistleblower Protection Act (WPA) under 5 U.S.C. § 2302(b)(8)(A). The AJ ruled in the affirmative with regard to issues (1) and (2) and in the negative with regard to issue (3). For the reasons set forth below, we REVERSE the AJ's rulings as to issues (1) and (2), AFFIRM AS MODIFIED his ruling with regard to issue (3), VACATE the stay order, and RETURN the case to the Western Regional Office for further adjudication.

BACKGROUND

¶ 2 Prior to his removal, the appellant was employed by the agency's Transportation Security Agency (TSA) in the SV-I position of Federal Air Marshal (FAM). Initial Appeal File (IAF) 1 (SF-0752-06-0611-I-1), Tab 1. The relevant facts are undisputed. In July of 2003, the appellant received a text message on his government-issued mobile phone stating that all RON (Remain Overnight) missions up to August 9th would be cancelled. The appellant alleged that he believed that the cancellation of these missions was detrimental to public safety. He raised this concern with his supervisor. He then attempted to raise it with the Office of the Inspector General. On July 29,

2003, he disclosed the text message to the media. IAF 1, Tab 4, Subtab 4(J) (Exhibit 2). The agency conducted an investigation. IAF 1, Tab 4, Subtab 4(J). Thereafter, by letter dated September 13, 2005, the agency proposed to remove the appellant based on three charges: (1) Unauthorized Media Appearance; (2) Unauthorized Release of Information to the Media; and (3) Unauthorized Disclosure of SSI. IAF 1, Tab 4, Subtab 4(G). In the notice of removal, however, the deciding official determined that charges (1) and (2) of the proposal were not sustained by the evidence of record. He sustained charge (3), Unauthorized Disclosure of SSI. IAF 1, Tab 4, Subtab 4(A). In that charge, the agency alleged that on July 29, 2003, the appellant disclosed to the media that all Las Vegas Field Office FAMs were sent a text message to their government-issued mobile phones that all RON missions would be cancelled, or words to that effect, in violation of 49 C.F.R. § 1520.5(b)(8)(ii). IAF 1, Tab 4, Subtabs 4(A), 4(G). Effective April 11, 2006, the agency removed the appellant based upon its decision to sustain charge (3) and its determination that, after consideration of the *Douglas* factors, the penalty of removal was appropriate for the sustained charge. IAF 1, Tab 4, Subtab 4(A).

¶ 3 The appellant filed a timely appeal of the removal to the Board. IAF 1, Tab 1. He alleged, among other things, that the removal was based on whistleblowing because the agency would not

have taken the action in the absence of the protected disclosures. *Id.*

¶ 4 Subsequently, on August 31, 2006, the agency issued a "Final Order," finding that the appellant's disclosure of information to the media, as set forth in the charge, was SSI covered by 49 C.F.R. § 1520.7(j) (2003). IAF 1, Tab 22 (Attachment). The appellant moved to dismiss the appeal without prejudice to allow him to petition for review of the Final Order to the U.S. Court of Appeals for the Ninth Circuit. *Id.*, Tab 27. The agency did not object to the motion. *Id.*, Tab 28. Accordingly, the AJ dismissed the appeal without prejudice to refiling, among other things, no later than 30 days after the Court of Appeals had issued a final determination in the appellant's petition for review of the agency's Final Order on SSI. IAF 1, Tab 29. On September 16, 2008, the Court of Appeals issued a decision denying the appellant's petition. *MacLean v. Department of Homeland Security*, 543 F.3d 1145 (9th Cir. 2008); IAF 2, Tab 1. The court found that the agency's determination that the information the appellant disclosed to the press was SSI was supported by substantial evidence. *Id.*

¶ 5 The appellant timely refiled his appeal with the Board's regional office. IAF 2 (SF-0752-06-0611-I-2), Tab 1. During proceedings on the refiled appeal, the AJ convened a conference call to discuss discovery-related issues. IAF 2, Tab 3. The parties, however, agreed that it would be

more efficient to obtain rulings from the AJ on certain legal issues so they could determine how to proceed. The parties agreed to confer and submit a list of the issues on which they would like rulings. Thereafter, the AJ was to issue an order framing the issues and directing the parties to brief them, after which time he would rule on them. *Id.* The parties, however, could agree on only one issue, i.e., whether the WPA can protect a disclosure that is SSI. IAF 2, Tab 6. Subsequently, the AJ ordered the parties to brief six issues and both parties complied with his request. IAF 2, Tabs 7, 8, 10. The AJ issued an order on December 23, 2008, ruling on the six issues briefed by the parties, including the three issues that are the subject of this interlocutory appeal. IAF 2, Tab 14. As noted above, with regard to issues (1) and (2), he ruled in the affirmative. As to issue (3), he ruled in the negative. *Id.* The agency moved for certification of an interlocutory appeal on issues (1) and (2). IAF 2, Tab 20. The appellant opposed the agency's motion for certification. *Id.*, Tab 21. The AJ granted the agency's motion for certification of an interlocutory appeal on issues (1) and (2). He added issue (3) and certified his rulings on the three issues for review by the Board. IAF 2, Tab 23.

Government Accountability Project (GAP) Submission

¶ 6 Subsequent to the AJ's certification of this interlocutory appeal to the Board, GAP filed a motion for leave to file a brief of *amicus curiae* supporting the appellant in this matter. Along with its motion, GAP submitted a brief addressing issue (3) certified for interlocutory appeal. IAF 2, Tab 25. In its brief, GAP argues that the AJ's ruling that a disclosure of information that is SSI cannot also be a disclosure protected by the WPA under 5 U.S.C. § 2302(b)(8)(A) cannot co-exist with Congressional intent or public policy underlying the WPA. In addition, GAP argues that it cannot co-exist with statutory language because the ruling would restore specific agency authority rejected by Congress, fails to recognize that Congress used different language when referring to statutory versus regulatory authority, would add loopholes to whistleblower protection not included in statutory language, and disregards the critical criteria of specificity even for statutory restrictions on whistleblowing disclosures. In addition, the Federal Law Enforcement Officers Association (FLEOA) filed a motion for leave to join as *amicus curiae* the brief filed by GAP supporting the appellant in this matter. The motions of GAP and FLEOA are GRANTED and the Board has considered these additional legal arguments in deciding the issues in this interlocutory appeal.

ANALYSIS

¶ 7 An AJ may certify an interlocutory appeal if he determines that the issues presented are of such importance to the proceeding that they require the Board's immediate attention. 5 C.F.R. § 1201.91. An AJ will certify a ruling for review only if the record shows that the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion, and an immediate ruling will materially advance the completion of the proceeding, or that the denial of an immediate ruling will cause undue harm to a party or the public. *Fitzgerald v. Department of the Air Force*, 108 M.S.P.R. 620, ¶ 6 (2008); 5 C.F.R. § 1201.92. With regard to the issues noted above, we find that these requirements have been met.

(1) Whether the Board lacks the authority to review the determination by the agency, and affirmed by the U.S. Court of Appeals for the Ninth Circuit, that information the appellant disclosed constituted SSI and (2) whether the fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him affects the issue in (1) above.

¶ 8 Because the analysis of these two issues is intertwined, we consider the issues together. The agency argues that the Board lacks the authority to review the agency's affirmed SSI determination because (1) Congress provided the TSA with the responsibility of defining, regulating, and protecting SSI under 49 U.S.C. § 114(s), and (2)

the only avenue it provided individuals to challenge TSA's SSI determination is before the United States Court of Appeals pursuant to 49 U.S.C. § 46110.

¶ 9 The starting point for every case involving statutory construction is the language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985); *Miller v. Department of Transportation*, 86 M.S.P.R. 293, ¶ 7 (2000). Where the statutory language is clear, it must control absent clearly expressed legislative intent to the contrary. *Lewark v. Department of Defense*, 91 M.S.P.R. 252, ¶ 6 (2002); *Todd v. Department of Defense*, 63 M.S.P.R. 4, 7 (1994), *aff'd*, 55 F.3d 1574 (Fed. Cir. 1995). Statutory provisions should not be read in isolation; rather, each section of a statute should be construed in connection with other sections so as to produce a harmonious whole. *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 17 (2007).

¶ 10 The initial statutory provision at issue in this matter provides, in pertinent part, the following:

> (s) **Nondisclosure of Security Activities.**—
>
> (1) **In general**—Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter

> 449 of this title if the Under Secretary decides that disclosing the information would—
>
> (A) be an unwarranted invasion of personal privacy;
>
> (B) reveal a trade secret or privileged or confidential commercial or financial information; or
>
> (C) *be detrimental to the security of transportation.*

49 U.S.C. § 114(s)(1) (emphasis added).

¶ 11 In his December 23, 2008 issues and rulings order, the AJ determined that the Board has the authority to review the determination by the deciding official in the removal action that the information the appellant disclosed was SSI. IAF 2, Tab 14. He found that the timing of the agency's issuance of a Final Order on this matter had an affect on his determination. In addition, he noted that the charge at issue in this appeal was brought on September 13, 2005, was sustained by the deciding official on April 10, 2006, and was an improper disclosure of SSI as defined in 49 C.F.R. § 1520.5(b)(8). He noted further that the agency's Final Order finding that the information the appellant disclosed constituted SSI under the SSI regulation then in effect, 49 C.F.R. § 1520.7(j), was not issued until August 31, 2006. He reasoned that in reviewing the agency's charge, the Board will review the charge the agency brought, not a charge it could have, but did not bring.

He further explained that the nature of an agency's action against an appellant at the time that an appeal is filed with the Board is determinative of the Board's jurisdiction. Applying these two rules, the AJ found that the agency's decision to issue a Final Order finding that the information the appellant disclosed constituted SSI had no effect on its burden to prove each of the elements of its charge by preponderant evidence, including that the information the appellant disclosed met the regulatory definition of SSI. He concluded that if the agency had issued a Final Order finding that the information the appellant disclosed constituted SSI, and then removed him based on that Final Order, the Board would be bound by any court decision on appeal of the order. He stated that, although the Board lacks the authority to review the Final Order issued by the agency on August 31, 2006, pursuant to 49 U.S.C. § 46110, the Final Order is not at issue in this appeal, as it did not, in fact, exist at the time the agency brought its charge. *Id.*

Congress provided TSA with the responsibility of defining, regulating, and protecting SSI.

¶ 12 Congress initially required the federal agency responsible for civil aviation security to issue regulations prohibiting the disclosure of certain information in the interest of protecting air transportation. Federal Aviation Act of 1958, Pub. L. No. 93-366, §§ 202, 316(D), 72 Stat. 7449

(codified at 49 U.S.C. §§ 1341-1355). At that time, the Federal Aviation Administration (FAA) was the agency responsible for enforcing the requirement. *Id.* Later, Congress placed this responsibility in TSA. Aviation and Transportation Security Act of 2001 (ATSA), Pub. L. No. 107-71, § 101(e), 115 Stat. 597. Under this authority, the Under Secretary of TSA is required to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C). Based upon this mandate, the Under Secretary has defined certain types of information as SSI and has limited the disclosure of that information to certain circumstances. 49 C.F.R. part 1520.

¶ 13 Sensitive Security Information is defined in the regulations as, among other things, "[s]pecific details of aviation security measures that are applied directly by the TSA and which includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." 49 C.F.R. § 1520.7(j) (2003). Information of this kind, as well as records containing such information, constitutes SSI unless the Under Secretary provides in writing to the contrary. 49 C.F.R. § 1520.7. Based upon the foregoing, we find that Congress provided TSA with

the responsibility of defining, regulating, and protecting SSI under 49 U.S.C. § 114(s).

Congress provided individuals with an avenue to challenge TSA's SSI determination before the United States Court of Appeals pursuant to 49 U.S.C. § 46110, and the appellant in this case availed himself of that avenue, so the finding of the court is binding in this proceeding.

¶ 14 In charge (3), the appellant is alleged to have disclosed SSI when he disclosed to the media that all Las Vegas Field Office FAMs were sent a text message to their government-issued mobile phones that all RON missions would be cancelled, or words to that effect. During proceedings below, the AJ then assigned the case granted the appellant's motion to dismiss the appeal without prejudice to allow the appellant the opportunity to appeal the agency's Final Order finding that the information he disclosed constituted SSI. IAF 1, Tab 7.

¶ 15 Under 49 U.S.C. §§ 114(s), 46110(a), when the Under Secretary determines by final order that particular material qualifies as SSI, that determination constitutes final agency action subject to judicial review. 49 U.S.C. § 46110. The statute authorizes review of such orders in the D.C. Circuit or the court of appeals for the circuit in which a complaining party resides or has its principal place of business. *Id.* Congress provided the D.C. Circuit or U.S. Courts of Appeals with the exclusive jurisdiction to review the agency's SSI determination. *Id.* Under 49 U.S.C.

§ 46110(c), only these courts are authorized to "affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings." A decision by a court of appeals pursuant to this section may be reviewed only by the Supreme Court under section 1254 of title 28. 49 U.S.C. § 46110(e).

¶ 16 In addition, as noted above, the appellant actually appealed the agency's Final Order to the U.S. Court of Appeals for the Ninth Circuit. *MacLean*, 543 F.3d at 1145. In finding that the information contained in the text message qualifies as SSI, the court interpreted the construction it gives to the term "order" in the statute at 49 U.S.C. § 46110. The court stated, in pertinent part, that:

> [P]ursuant to 49 U.S.C. § 46110(c), we have jurisdiction to review only final agency "orders." We give "broad construction to the term 'order' in" § 46110, but the TSA's classification of its own order as a "final order" does not control our review. Generally, an order under § 46110 is reviewable if it "'carries a note of finality, and applies to any agency decision which imposes an obligation, denies a right, or fixes some legal relationship.'" We have explained that an agency decision qualifies as a final "order" under 49 U.S.C. § 46110 if it possesses four qualities: (1) it is supported by a "reviewable administrative record," (2) it is a "'definitive' statement of the agency's posi-

> tion," (3) it has a "'direct and immediate effect' on the day-to-day business on the party asserting wrongdoing," and (4) it "'envisions immediate compliance with the [order's] terms.'"
>
> . . . . We review de novo legal questions raised by the TSA's order. We review the TSA's findings for substantial evidence. *See* 49 U.S.C. § 46110(c). We may set aside the order if it is unconstitutional, contrary to law, arbitrary and capricious, *ultra vires*, or unsupported by substantial evidence, *see* 5 U.S.C. § 706(2)(A)-(E), but we must also accord deference to an agency's interpretation of its own regulations. We may "affirm, amend, modify, or set aside any part of the order and may order the Secretary . . . to conduct further proceedings." 49 U.S.C. § 46110(c).

Id. at 1149-50 (citations omitted). Thus, Congress provided individuals with an avenue to challenge TSA's SSI determination in federal appellate courts pursuant to 49 U.S.C. § 46110. Further, the appellant actually availed himself of that avenue and received an adverse decision. Accordingly, we hold that, under the facts of this case, the Board does not have the authority to review TSA's SSI determination because the U.S. Court of Appeals for the Ninth Circuit has issued a decision upholding TSA's determination.

¶ 17 With regard to the burden of proof issue, the AJ is correct in stating that the agency has the burden to prove each of the elements of its charge by preponderant evidence, including that the in-

> formation the appellant disclosed met the regulatory definition of SSI. 5 U.S.C. § 7701(c)(1)(B). In a Board appeal from an adverse action—
>
> an employee puts the agency in the position of plaintiff bearing the burden of first coming forward with evidence to establish the fact of misconduct, the burden of proof, and the ultimate burden of persuasion, with respect to the basis for the charge or charges. The employee (while denominated appellant) has the advantageous evidentiary position of a defendant with respect to that aspect of the case.

Jackson v. Veterans Administration, 768 F.2d 1325, 1329 (Fed. Cir. 1985).

¶ 18 We find that the agency can meet its burden of proof on the charge because where, as here, a federal court has determined that information relevant to a Board appeal constituted SSI, that determination is binding in the Board proceeding. In an analogous situation involving an employee's entitlement to Office of Workers' Compensation Programs (OWCP) benefits, OWCP's decisions regarding an employee's entitlement to such benefits are final and binding on the Board. *Chamberlain u Department of the Navy*, 50 M.S.P.R. 626, 634 n.4 (1991); *see also Miller v. U.S. Postal Service*, 26 M.S.P.R. 210, 213 (1985) (where statute makes OWCP's determination regarding entitlement to benefits "final and conclusive for all purposes," such a determination is binding in a Board proceeding).

¶ 19 ... The fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him does not alter our conclusion on issue (1) above because Congress provided individuals with an opportunity to challenge TSA's SSI determination before the United States Court of Appeals, and the appellant actually availed himself of that opportunity. Pursuant to 49 U.S.C. § 46110(c), the U.S. Court of Appeals for the Ninth Circuit gained "exclusive jurisdiction" over the appellant's petition challenging TSA's SSI determination "when [his] petition [was] sent [to the appropriate TSA official]." Because this grant of "exclusive jurisdiction" in federal court was triggered in this case, the Board lacks authority to review TSA's determination. We need not decide, and do not decide, whether the Board could make its own finding on whether particular information was SSI when the issue was in dispute and material to the outcome in a Board appeal, and there was no federal court decision on the question under 49 U.S.C. § 46110.

(3) Whether a disclosure of information that is SSI can be a disclosure protected by the WPA under 5 U.S.C. § 2302(b)(8)(A).

¶ 20 Title 5 U.S.C. § 2302(b)(8)(A), provides, in pertinent part, the following:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to

> such authority . . . (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, *if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.*

5 U.S.C. § 2302(b)(8)(A) (emphasis added).

¶ 21 The agency argues that a disclosure of information that is SSI, except to "persons with a need to know," is prohibited by statute and regulation, and as such, the appellant cannot seek the protection of the WPA to cover his alleged misconduct. IAF 2, Tab 10. The appellant contends that only agency regulations prohibit disclosure of information that is SSI, and that the Board has interpreted the exclusion from whistleblower protection for disclosures that are "prohibited by law or Executive Order" to apply only to those disclosures not allowed by "statutes and court interpretations of statutes." IAF 2, Tabs 8, 13.

¶ 22 Title 5 U.S.C. § 2302(b)(8)(A) excludes from coverage disclosures "specifically prohibited by law" or Executive order. The agency does not argue that any Executive order prohibited disclosure of the information the appellant allegedly disclosed. The question then is whether any "law" prohibited the alleged disclosure. The Board has held that "prohibited by law," as that term is used in section 2302(b)(8), means prohibited by statutory law as opposed to regulation. *Kent v. General Services Administration*, 56 M.S.P.R. 536 (1993). In *Kent*, the Board addressed the question of whether the General Services Administration (GSA) regulations fell within the parameters of the "prohibited by law" language set forth in 5 U.S.C. § 2302(b)(8)(A). The Board ruled that regulations promulgated by a federal agency do not fall within the term "law" as it is used in the Civil Service Reform Act of 1978 (CSRA), as amended by the WPA, after reviewing the construction of the statute and the legislative history.

¶ 23 Here, Congress required in the ATSA that the agency "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C). For the reasons set forth below, we find that disclosures that are prohibited by the regulations promulgated pursuant to 49 U.S.C. § 114(s) are

"prohibited by law" within the meaning of 5 U.S.C. § 2302(b)(8)(A).

¶ 24 The starting point for the Board's analysis of the "prohibited by law" language is *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). In *Chrysler*, the Court undertook the analogous task of interpreting a statute that contained a special exception for activities "authorized by law." In considering whether an agency regulation that authorized the activity satisfied the condition, the Court explained:

> It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the force and effect of law. This doctrine is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause. It would therefore take a clear showing of contrary legislative intent before the phrase "authorized by law" in [the statutory section at issue] could be held to have a narrower ambit than the traditional understanding.

441 U.S. at 295-96.

¶ 25 *Chrysler* thus sets up a default rule, and a specific exception. That is, agency regulations that are (1) properly promulgated, and (2) substantive, must be accorded the force and effect of law absent a clear showing of contrary legislative intent. With regard to the substantive characteristics and procedural requisites, the *Chrysler*

court elaborated three conditions for a rule to have the force and effect of law. These are (1) it must be a "substantive rule"; (2) Congress must have granted the agency authority to create such a regulation; and (3) the regulations must be promulgated in conformity with any procedural requirements imposed by Congress. 441 U.S. at 301-03; *see also Hamlet v. United States*, 63 F.3d 1097, 1105 n.6 (Fed. Cir. 1995) (distilling the three conditions from *Chrysler*).

¶ 26 Here, these three conditions are present for initial application of the default rule to 49 C.F.R. § 1520.7 (2003).[1] A substantive rule is a "legislative-type rule" that "affect[s] individual rights and obligations." *Chrysler*, 441 U.S. at 302. Title 49 C.F.R. § 1520.7 certainly affects individual rights and obligations, by expressly limiting the speech rights of possessors of information defined by the regulation as SSI. It is also clear that 49 U.S.C. § 114(s) expressly granted the Under Secretary the authority to promulgate the regulations, which "prohibit[] the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s). Finally, the regulations at 49 C.F.R. part 1520 were properly

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[1] Although not separately discussed, the same analysis applies to the virtually identical language of the current rule codified at 49 C.F.R. § 1520.5.

promulgated under the Administrative Procedure Act rules governing legislative rulemaking—notice was published, comments were received, an interim final rule soliciting further comments was published, and a final rule was issued.

¶ 27 Consequently, "absent a clear showing of contrary legislative intent" the phrase "prohibited by law" in 5 U.S.C. § 2302(b)(8)(A) must be read to include disclosures prohibited by 49 C.F.R. § 1520.7 (2003). In *Kent*, the Board examined the language and legislative history of 5 U.S.C. § 2302(b)(8)(A) and discovered "a clear legislative intent to limit the term 'specifically prohibited by law' . . . to statutes and court interpretations of statutes." 56 M.S.P.R. at 542.

¶ 28 With regard to the statutory language, the Board concluded that inclusion of the phrase "specifically prohibited by law" following other statutory language referring to "a violation of any law, rule, or regulation," "indicated that the term 'law' was not intended to encompass rules and regulations." 56 M.S.P.R. at 542. We do not find that this distinction evidences a clear showing of legislative intent. The differing grammatical structures of the phrases are not compatible. Indeed, drawing a distinction between the phrases "of any law, rule, or regulation" and "by law" based simply on the latter's failure to include "rule, or regulation" begs the question at issue: whether the default construction of "by law" to include regulations has been overcome by

clear legislative intent. Given the traditional default rule, Congress would have no reason to use the broader (and redundant) phrase "by law, rule, or regulation" when "by law" suffices. Moreover, the phrase "by law" has been in legislative use since at least the mid-19th century. *See Chrysler*, 441 U.S. at 296-98 (discussing antecedents to the Trade Secrets Act of 1947, which, since the Revenue Act of 1864, included language prohibiting disclosures except as "provided by law" or "authorized by law"). As the *Chrysler* court explained, the language has been "well-established" to encompass properly promulgated substantive agency regulations. Congress must be presumed to have been aware of these antecedents and their construction when it opted to use the phrase "by law" in the CSRA.

¶ 29 The Board in *Kent* also relied upon legislative history to support its conclusion that disclosures prohibited by regulation are not prohibited "by law" under the CSRA. The Board opined that "Congress' concern with internal agency rules and regulations impeding the disclosure of government wrongdoing is consistent with this restrictive reading of the statutory language." 56 M.S.P.R. at 542 (citing S. Rep. No. 95-969, 95th Cong., 2d Sess. 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743). The Board also cited a passage from the House Conference Report explaining that "prohibited by law" refers to "statutory law and court interpretations of those statutes . . . not . . . to agency rules and regulations."

Id. at 542-43 (citing H.R. Conf. Rep. No. 95-1717, 95th Cong., 2d Sess. 130, *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864).

¶ 30 A closer examination of the legislative history indicates that Congress' intent is at best ambiguous, and therefore does not meet the standard of clarity required by *Chrysler*. The original version of the bill as introduced in both the House and the Senate protected disclosures that were "not prohibited by law, rule, or regulation." H.R. 11280 and S. 2640. The Senate version was amended by the Senate Committee on Governmental Affairs to substitute the phrase "not prohibited by statute." S. Rep. No. 95-969, 95th Cong., 2d Sess. 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2730, 2743. The House version was amended by the House Committee on Post Office and Civil Service to substitute the phrase "not prohibited by law." The full House and Senate each passed their respective versions of the bill, both as S. 2640. In conference, the House language "not prohibited by law" was selected in lieu of the Senate language "not prohibited by statute." H.R. Conf. Rep. No. 95-1717, 95th Cong., 2d Sess. 130, *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864. The selection of the broader phrase "by law" evidences Congressional intent to expand the scope of the exemption beyond mere statutes to include all "law." Under the general rules of statutory construction, Congress can be presumed to have known that its selection of the broader phrase "by law,"

in the absence of any limiting language, could expand the scope of the exemption to include all "law." *See D'Elia v. Department of the Treasury*, 60 M.S.P.R. 226, 232 (1993), *overruled on other grounds, Thomas v. Department of the Treasury*, 77 M.S.P.R. 224 (1998), *Thomas overruled in part on other grounds by Ganski v. Department of the Interior*, 86 M.S.P.R. 32 (2000).

¶ 31 Moreover, the legislative history also shows that even the Senate's adoption of the narrower phrase "by statute" was not intended to exclude substantive regulations mandated by Congress, such as those promulgated pursuant to 49 U.S.C. § 114(s). The Senate Committee on Governmental Affairs modified the original bill to limit the exemption to disclosures prohibited "by statute," out of "concern that the limitation of protection in S. 2640 to those disclosures 'not prohibited by law, rule, or regulation,' would encourage the adoption of *internal procedural regulations against disclosure*, and thereby enable an agency to discourage an employee from coming forward with allegations of wrongdoing." S. Rep. No. 95-969, 95th Cong., 2d Sess. 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743-44 (emphasis added). "Rules of agency organization, procedure, or practice" are recognized as distinct from the "substantive rules" that are authorized by Congress and can have the force of law. *Chrysler*, 441 U.S. at 301. Thus, by expressly excluding "internal proce-

dural regulations," the Senate Committee implicitly included substantive agency regulations.

¶ 32 The House Conference Report explanation that "prohibited by law" refers to "statutory law and court interpretations of those statutes . . . not . . . to agency rules and regulations," could be construed in isolation to suggest an intent to the contrary to protect disclosures prohibited by a substantive regulation. However, in light of the contrary indicia of Congressional intent, this language alone cannot establish the "*clear showing* of contrary legislative intent" required before the phrase "prohibited by law" "could be held to have a narrower ambit than the traditional understanding." 441 U.S. at 295-96. And there is, in fact, no other evidence in the Congressional record to establish that the language was intended to convey such intent. Indeed, the House Report is silent with regard to its substitution of "by law" for the "by law, rule, or regulation" language of the bill as originally introduced. House Report No. 95-1403 at 17 (referring only generally to the specific prohibited personnel practices enumerated at new section 2302(b)(2)-(11)), *reprinted in Legislative History of the Civil Service Reform Act of 1978*, Committee on Post Office and Civil Services, Committee Print No. 96-2 (1979). Furthermore, the minutes of the Conference Committee sessions from which the enacted version of the bill emerged, reflect that the selection of the House's "by law" over the Senate's "by

statute" was not even discussed by the Committee members.

¶ 33 Although the AJ in this case did not undertake a detailed *Chrysler* analysis, his rationale for distinguishing *Kent* was based upon the standards addressed in *Chrysler*. He observed that the statute under which the regulation at issue in *Kent* was promulgated did not "require [the agency] to include in its regulations categories of information that may not be disclosed to a third party, as the GSA alleged Mr. Kent did in a charge underlying its action against him. Therefore, at most, Mr. Kent's disclosure(s) violated the regulations, but not the law that mandated them." Certification Order at 9. The same point made under the *Chrysler* framework would be that one of the three prerequisites to giving the regulation the effect of law was not satisfied because Congress did not grant the GSA authority to promulgate a regulation that prohibited the disclosure of information. In other words, the Board in *Kent* went too far by holding that a regulation could *never* be a law prohibiting disclosure within the meaning of 5 U.S.C. § 2302(b)(8). The same outcome could have been reached by holding simply that the GSA regulation at issue was not entitled to the force and effect of law under the governing standards.[2] In contrast, those standards man-

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[2] Thus, to the extent that *Kent v. General Services Administration*, 56 M.S.P.R. 536 (1993), holds that a regulation could never be

date that 49 C.F.R. § 1520.7 (2003) be given the force and effect of law in the context of 5 U.S.C. § 2302(b)(8)(A). Based upon the foregoing, we find that a disclosure in violation of the regulations governing SSI, which were promulgated pursuant to 49 U.S.C. § 114(s), is "prohibited by law" within the meaning of 5 U.S.C. § 2302(b)(8)(A) and thus cannot give rise to whistleblower protection.

ORDER

¶ 34 Accordingly, we reverse the AJ's rulings with regard to issues (1) and (2), affirm his ruling as modified with regard to issue (3), and return this appeal to the Western Regional Office for further adjudication consistent with this Opinion and Order. This is the final order of the Merit Systems Protection Board in this interlocutory appeal. 5 C.F.R. § 1201.91.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

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a law prohibiting disclosure within the meaning of 5 U.S.C. § 2302(b)(8)(A), we modify it.

APPENDIX E

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

Docket No. SF-0752-06-0611-I-2

ROBERT J. MACLEAN, APPELLANT

v.

DEPARTMENT OF HOMELAND SECURITY, AGENCY

Filed: Feb. 10, 2009

ORDER GRANTING MOTION FOR CERTIFICATION AS INTERLOCUTORY APPEAL AND STAYING PROCEEDINGS

Background

On May 10, 2006, the appellant timely filed a petition appealing the decision of the Transportation Security Administration (TSA or "the agency") to remove him from the position of Federal Air Marshal, SV-1, effective April 11, 2006. The Board has jurisdiction over this appeal under 5 U.S.C. §§ 7512(1), 7513(d), 7701(a), and 7702(a).

The agency proposed the appellant's removal on three charges. After the appellant responded to the proposal, the deciding official sustained only the

charge of Unauthorized Disclosure of Sensitive Security Information (SSI). More specifically, the sustained charge alleged that, on July 29, 2003, the appellant disclosed to the media that all Las Vegas Federal Air Marshals were sent a text message to their government-issued mobile phones that all Remain Overnight (RON) missions would be cancelled, or words to that effect, in violation of 49 C.F.R. § 1520.5(b)(8)(ii). The deciding official found that removal remained the appropriate penalty.

After the appellant filed his appeal, on August 31, 2006, the agency issued a "Final Order," signed by Andrew Colsky, Director SSI Office, finding that the appellant's disclosure of information at issue in the charge was SSI, covered by 49 C.F.R. § 1520.7(j).[1] The administrative judge to whom this appeal was assigned at the time denied the appellant's request to either extend the close of discovery or postpone resolution of this appeal while the appellant petition for review of the agency's Final Order to the Court of Appeals, pursuant to 49 U.S.C. § 46110. The administrative judge suggested, however, that he would agree to dismiss the appeal without prejudice to refiling under certain conditions. The appellant moved for such a dismissal, unopposed by the agency, and on October 5, 2006, the administrative judge issued an initial decision dismissing the appeal without prejudice, subject to refiling, *inter alia*, no later than 30 days after the Court of Appeals issues a final de-

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[1] Colsky noted that, on May 18, 2004, TSA had recodified § 1520.70) at 49 C.F.R. 1520.5(b)(8)(ii).

termination in the appellant's petition for review of the agency's Final Order.

On September 16, 2008, the U.S. Court of Appeals for the Ninth Circuit issued a *per curiam* Opinion denying the appellant's petition, finding that the agency's determination that the information the appellant disclosed was SSI was supported by substantial evidence. The appellant timely refiled this appeal and, during an October 20, 2008 conference call, the parties expressed an interest in briefing certain issues the resolution of which they believed could make adjudication of this appeal more efficient. They could not agree on which issues should be the subject of such briefing, however, and submitted separate lists of issues. In a November 14, 2008 Order, I ordered the parties to brief six issues. Both parties complied, and I granted the appellant's request to respond to the agency's brief.

On December 23, 2008, I issued an Order ruling on three of the issues and holding in abeyance a final ruling on two issues, pending further evidence and argument. I found that, as a result of my ruling on one of the issues, it was no longer necessary to decide a remaining issue. The appellant has requested that I reconsider my ruling on one issue, and the agency has moved for certification as an interlocutory appeal of the other two issues on which I ruled. The appellant opposes the agency's motion for certification, and the agency has filed a reply in opposition to the agency's request for reconsideration.

Issues

The three issues on which I ruled are as follows:

(1) Whether the Board has the authority to review the determination by the agency, and affirmed by the U.S. Court of Appeals for the Ninth Circuit, that the information the appellant disclosed constituted Sensitive Security Information (SSI).

(2) Whether the fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him has any effect on the issue in (1), above.[2],

(3) Whether a disclosure of information that is SSI can also be a disclosure protected by the Whistleblower Protection Act under 5 U.S.C. § 2302(b)(8)(A),

Discussion and Findings

Issues (1) and (2)

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[2] As to the second issue, I had requested that the parties also address in their briefs "whether the timing of the determination [the agency's Final Order] has any other effect on the issues for adjudication in this appeal." The appellant argued that the agency's issuance of the Final Order after the appeal had been filed evidenced retaliatory animus, but this assertion is not relevant to the issues under consideration in this order, and being certified for interlocutory appeal, and I have therefore edited the second issue to remove the irrelevant portion.

In my December 23, 2008 order, I found that the Board has authority to review the determination by the deciding official in the appellant's removal action that the information the appellant disclosed was SSI. I addressed issues (1) and (2) together because I found that the timing of the agency's issuance of a Final Order on this issue had an effect on my determination. I re-state my analysis below, with some additional explanation.[3]

The only charge at issue in this appeal-Unauthorized Disclosure of SSI-was brought on September 13, 2005, and was sustained by the deciding official on April 10, 2006. In the charge, the agency alleged that the appellant's act of informing the media on July 29, 2003 that all Las Vegas FAMs had received a text message from the agency notifying them that all RON missions up to August 9, 2003 would be cancelled was an improper disclosure of SSI, as SSI is defined in 49 C.F.R. § 1520.5(b)(8). The agency's Final Order finding that the information the appellant disclosed constituted SSI under the SSI regulation then in effect—49 C.F.R § 1520.7(j)—was not issued until August 31, 2006.

It is well-settled that, in reviewing the agency's charge, the Board will review the charge the agency brought, not a charge it could have, but did not, bring.

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[3] Portions of the Discussion and Findings section in this order are similar in many respects to my December 23, 2008 order, with slight changes to clarify some points and to address additional argument by the parties presented after the previous order was issued.

See, e.g., Gustave-Schmidt v. Department of Labor, 87 M.S.P.R. 667, 673 (2001). Moreover, the Board has held that the nature of an agency's action against an appellant at the time that an appeal is filed with the Board is determinative of the Board's jurisdiction. *See Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1991). Applying these precepts to the issue before me, I find that the agency's decision to issue a Final Order finding that the information the appellant disclosed constituted SSI did not have any effect on its burden to prove each of the elements of its charge by preponderant evidence, including that the information he disclosed met the regulatory definition of SSI. While the agency is correct that Congress gave the TSA Administrator authority to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation," 49 U.S.C. § 114(s),[4] I read the statute as providing to the Administrator or his designee authority to set out categories of information that may not be disclosed; the statute does not state that only a TSA official may determine whether a specific disclosure falls within a specific category in the context of an adverse action under appeal before the Board.

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[4] The Board has previously noted that TSA changed the title of Under Secretary to Administrator after the agency was transferred from the Department of Transportation to the Department of Homeland Security. *See Wilke v. Department of Homeland Security*, 104 M.S.P.R. 662, ¶ 5 n.3 (2007).

The agency asserts in its motion to certify this issue as an interlocutory appeal that "the information was SSI at all relevant times: when it was created, when it was transmitted to Appellant and when Appellant improperly disclosed it to the media." The agency has not shown that any individual with authority to make a *determination* that the appellant had disclosed SSI had done so at the time the appellant was removed, however, and it has never argued that the deciding official had such authority. Under the agency's construction of the statute and its own regulations, any agency employee who serves as a deciding official in an adverse action has the authority to determine that a given disclosure of information falls within the definition of SSI, and that determination cannot be questioned in a proceeding before the Board. I find no support for such a reading of the applicable statute, or even the agency's own regulations and other guidance. To the contrary, if an agency official with proper authority had issued a Final Order finding that the information the appellant disclosed constituted SSI, and then the agency removed him based on the Order, the Board would likely lack the authority to review the conclusion in the Order, and would be bound by any court decision on appeal of the order. Although the Board lacks the authority to review the Final Order issued by Andrew Colsky on August 31, 2006, pursuant to 49 U.S.C. § 46110,[5] the Final Order is not at issue in

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[5] I do not find the agency's cite to *Croft v. Department of the Air Force*, 40 M.S.P.R. 320 (1989) on point. In *Croft*, the Board agreed with the agency that it lacked authority to review the

this appeal, as it did not, in fact, exist at the time the agency brought its charge.

The agency also argues that the doctrine of collateral estoppel applies to the decision of the 9th Circuit Court of Appeals that substantial evidence supports the finding in the Final Order that the information the appellant divulged was SSI.[6] The Board has found that issue preclusion, or collateral estoppel, is appropriate when: (1) The issue is identical to that involved in the prior action; (2) the issue was actually

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agency's determination that certain information was classified, based on the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988). In *Egan*, the Court grounded its decision, in large part, on the primacy of the executive branch, under the Constitution, in assessing what information must be classified in the interest of national security. Here, while it is inarguable that Transportation security is highly important, and that Congress directed the agency to identify categories of information that cannot be disclosed, there is no separation of powers question at issue, and, absent issuance of a Final Order upon which the agency based its action, no precedent for foreclosing Board review of the agency's SSI assessment. In fact, the Board has read *Egan* narrowly, and has been loath to extend it to circumstances that do not involve classified information. And, TSA's Interim Sensitive Security Information (SSI) Policies And Procedures For Safeguarding And Control states that "SSI is not classified national security information subject to the handling requirements governing classified information."

[6] The agency cites the 9th Circuit opinion to support several of its points, particularly that the order would have an impact on the appellant's Board appeal of his termination. The Board may look to opinions of Circuits other than the Federal Circuit for guidance, but the opinions are not binding precedent. *See, e.g., Bullock v. Department of the Air Force*, 88 M.S.P.R. 531, ¶ 14 n.7 (2001).

litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as one whose interests were otherwise fully represented in that action. *See McNeill v. Department of Defense*, 100 M.S.P.R. 146, ¶ 15 (2005). As explained below, however, I agree with the appellant that the issue that the Board must adjudicate in this appeal is not "identical" to that decided by the court of appeals.

First, the agency charged the appellant with disclosing information that was SSI under 49 C.F.R. § 1520.5(8)(ii), a version of the regulation promulgated in 2004, while the Final Order found that his action had disclosed information that was SSI as defined in 49 C.F.R. 1520.7(j), which had been in effect in 2003. Although the two regulations are quite similar, the appellant has submitted evidence that Mr. Colsky, the agency's own expert on SSI, considered the differences between the regulations to be significant. Second, the issue before the 9th Circuit was whether substantial evidence supported the agency's contention that the information the appellant had disclosed amounted to SSI while, before the Board, the agency must prove by preponderant evidence that the information he divulged constituted SSI. *See, e.g., Parikh v. Department of Veterans Affairs*, 110 M.S.P.R. 295 (2008) (finding collateral estoppel inapplicable because issues were not identical where issue in first appeal required showing of preponderant evidence and in

second appeal standard was nonfrivolous allegation). Because of these differences in the issue presented, I find that collateral estoppel may not be applied to the court's finding to preclude the appellant from challenging in this appeal whether he divulged information that was SSI.

For the reasons stated above, I conclude that the Board has authority to review the determination in the agency's adverse action that the appellant disclosed information that falls within the regulatory definition of SSI.

Issue (3)

In my December 23, 2008 Order, I found that a disclosure of information that falls within the meaning of SSI is "specifically prohibited by law," pursuant to 5 U.S.C. § 2302(b)(8), and therefore cannot be a "protected" disclosure under the WPA. I have given full consideration to the appellant's request that I reconsider my ruling on this issue, and for the reasons explained below, the agency's request is **DENIED.**

The agency argued that a disclosure of SSI is "prohibited by statute and regulation, and as such, Appellant cannot seek the protection of the Whistleblower Protection Act (WPA) to cover his misconduct." The appellant contended that only agency regulations prohibit disclosure of information that is SSI, and that the Board has interpreted the ineligibility of whistleblower protection for disclosures that are "prohibited by law or Executive Order" to apply only to those disclosures not allowed by "statutes and court inter-

pretations of statutes." Both parties have cited *Kent v. General Services Administration*, 56 M.S.P.R. 536 (1993) in discussing this issue, with the appellant asserting that the holding in the case is directly on point and the agency attempting to distinguish it.

I agree with the parties that *Kent* appears to be the seminal case on the question of whether agency regulations fall within the ambit of the "prohibited by law" language in 5 U.S.C. § 2302(b)(8)(A). And, after careful consideration, I agree with the agency that the facts in the instant case are distinguishable from those in *Kent* in one important respect, and as a result, a disclosure of information that is SSI under the TSA regulations is a disclosure that is "prohibited by law," and is therefore not "protected" under the WPA. First, I agree with the appellant that *Kent* stands for the general proposition that regulations promulgated by a federal agency do not fall within the term "law" as it is used in the Civil Service Reform Act, as amended by the WPA, and that the Board came to that conclusion in *Kent* after reviewing the construction of the statute and the legislative history. In *Kent*, however, the regulations at issue were the Federal Acquisition Regulations (FAR), which are the procurement rules for the federal government that the General Services Administration (GSA) promulgated under a specific delegation of authority by Congress in the Federal Property and Administrative Services Act of 1949. *Kent*, 56 M.S.P.R. at 542. After review of that statute, however, I could find no language requiring GSA to include in its regulations categories of information that may not be disclosed to a third party, as GSA

alleged Mr. Kent did in a charge underlying its action against him. Therefore, at most, Mr. Kent's disclosure(s) violated the regulations, but not the law that mandated them.[7]

In contrast, in the instant case, as noted above, Congress required in the ATSA that the agency "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C). Thus, unlike in *Kent*, disclosure of information that is determined to be covered by the SSI regulations also constitutes a disclosure that was explicitly mandated to be prohibited by statute, even if the regulations set the exact parameters, rather than the statute itself. I agree with the agency that it would be an absurd result for Congress to direct TSA to issue regulations prohibiting the disclosure of information that is considered a threat to transportation security, and at the same time to intend that a TSA employee be shielded from discipline by the WPA for violating the regulations by disclosing such information. *See Preyor v. U.S. Postal Service*, 83 M.S.P.R. 571, 580 (1999) (an interpretation of a statute that would lead to absurd

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[7] The fact that the Board found that Mr. Kent's disclosure violated the Trade Secrets Act does not impact the relevant analysis in this order regarding whether regulations can be considered "law" in 5 U.S.C. § 2302(b)(8), as the Board addressed the Trade Secrets Act and the FAR separately in its opinion in *Kent*. 56 M.S.P.R. 536.

results is to be avoided when it can be given a reasonable application consistent with its words and legislative purpose). I find it highly unlikely that Congress would have tasked TSA with prescribing regulations prohibiting the disclosure of SSI if it believed that those regulations lacked the force and effect of "law" for purposes of the WPA, under all circumstances. *See Kligman v. Office of Personnel Management*, 103 M.S.P.R. 614, ¶ 12 (2006) (Congress is assumed to be aware of administrative interpretations of statute). Accordingly, I conclude that the fact that Congress specifically mandated the SSI regulations, unlike in *Kent*, brings the regulations within the definition of "law" in 5 U.S.C. 2302(b)(8)(A), and that a disclosure of information falling within the meaning of the SSI regulations is therefore "specifically prohibited by law," and cannot be a "protected disclosure" under the WPA.[8]

Certification for Interlocutory Appeal

I hereby **GRANT** the agency's motion, over appellant's opposition, and certify my ruling on the first two questions above for interlocutory appeal, pursuant to

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[8] I have afforded specific consideration to the appellant's argument that the use of the word "specifically" in the statute, which I left out in some of my discussion in my prior order, undermines my analysis. I am nonetheless unconvinced that inclusion of the word means that regulations to prohibit disclosure of certain information, promulgated at the direction of Congress, can never be considered "law" for purposes of the WPA.

5 C.F.R. § 1201.91.[9] I find that the issues "involve[] an important question of law or policy about which there is substantial ground for difference of opinion; and . . . [a]n immediate ruling will materially advance the completion of the proceeding," in that a ruling will clarify the agency's burden of proof at hearing on the only charge in this appeal. Further, I certify my ruling on the third question for interlocutory appeal on my own motion, as it also meets the standard set out above. Moreover no precedent on the issue exists and a ruling will determine whether the appellant may raise the defense that the agency's action was taken in retaliation for what he believes to be protected disclosures.

Proceedings Stayed

Pursuant to 5 C.F.R. § 1201.93(c), I hereby stay all further proceedings at the Regional level pending the full Board's resolution of the certified issues.

It is so **ORDERED.**

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[9] The agency slightly altered the issues I set out in my December 23, 2008 order in its motion. The changes to issue (1) are insignificant, but the agency states issue (2) as "Whether the fact that the Agency's final order post-dated Appellant's removal affects the Board's jurisdiction over the Agency's final order." It is undisputed, however, that the Board lacks jurisdiction to review the agency's final order. The question is whether the Board has authority to review the agency's determination that the appellant disclosed SSI as part of the charge because the agency issued the order after it removed the appellant. Accordingly, although I granted the agency's motion to certify the issue for interlocutory appeal, I did not alter the issue to match the question stated in the agency's motion.

FOR THE BOARD: /s/ CRAIG A. BERG
CRAIG A. BERG
Administrative Judge

APPENDIX F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

Docket No. SF-0752-06-0611-I-2

ROBERT J. MACLEAN, APPELLANT

v.

DEPARTMENT OF HOMELAND SECURITY, AGENCY

Dec. 23, 2008

ORDER

Following a lengthy dismissal of this appeal, without prejudice, during an October 20, 2008 conference call the parties indicated that adjudication of this appeal would likely be more efficient if they could obtain rulings on certain issues prior to determining how to proceed. After soliciting input to identify the subject issues, in a November 14, 2008 order, I directed the parties to file evidence and argument on six issues arising from the facts and applicable law in this appeal. Both parties complied and, on December 10, 2008, I granted the appellant's request to reply to the agency's brief. The appellant timely filed his reply on December 12, 2008.

Issues and Rulings

(1) Whether the Board has the authority to review the determination by the agency, and affirmed by the U.S. Court of Appeals for the Ninth Circuit, that the information the appellant disclosed constituted Sensitive Security Information (SSI).

(2) Whether the fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him has any effect on the issue in (1), above, and whether the timing of the determination has any other effect on the issues for adjudication in this appeal.

After full consideration, I find that the Board has authority to review the determination by the deciding official in the appellant's removal action that the information the appellant disclosed was SSI. I address issues (1) and (2) together because, as explained below, I find that the timing of the agency's issuance of a Final Order on this issue has an effect on my determination.

The only charge at issue[1] in this appeal-Unauthorized Disclosure of SSI was brought on September 13, 2005, and was sustained by the deciding official on April 10, 2006. In the charge, the agency alleged that the appellant's act of informing the media on July 29, 2003 that all Las Vegas FAMs had received a text message from the agency notifying them that all RON missions up to August 9, 2003 would be cancelled was an improper disclosure of SSI, as SSI is defined in

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[1] The other charges in the proposal letter were not sustained by the deciding official.

49 C.F.R. § 1520.5(b)(8). The agency's Final Order finding that the information the appellant disclosed constituted SSI under the SSI regulation then in effect—49 C.F.R § 1520.7(j)-was not issued until August 31, 2006.

It is well-settled that, in reviewing the agency's charge, the Board will review the charge the agency brought, not a charge it could have, but did not, bring. *See, e.g., Gustave-Schmidt v. Department of Labor*, 87 M.S.P.R. 667, 673 (2001). Moreover, the Board has held that the nature of an agency's action against an appellant at the time that an appeal is filed with the Board is determinative of the Board's jurisdiction. *See Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1991). Applying these precepts to the issue before me, I find that the agency's decision to issue a Final Order finding that the information the appellant disclosed constituted SSI did not have any effect on its burden to prove each of the elements of its charge by preponderant evidence, including that the information he disclosed met the regulatory definition of SSI. If the agency had issued a Final Order finding that the information the appellant disclosed constituted SSI, and then removed him based on the Order, the Board would likely lack the authority to review the conclusion in the Order, and would be bound by any court decision on appeal of the order. Although the Board lacks the authority to review the Final Order issued by Andrew Colsky on August 31, 2006, pursuant to 49 U.S.C.

§ 46110,[2] the Final Order is not at issue in this appeal, as it did not, in fact, exist at the time the agency brought its charge.

The agency also argues that the doctrine of collateral estoppel applies to the decision of the 9th Circuit Court of Appeals that substantial evidence supports the finding in the Final Order that the information the appellant divulged was SSI. The Board has found that issue preclusion, or collateral estoppel, is appropriate when: (1) The issue is identical to that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party

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[2] I do not find the agency's cite to *Croft v. Department of the Air Force*, 40 M.S.P.R. 320 (1989) on point. In *Croft*, the Board agreed with the agency that it lacked authority to review the agency's determination that certain information was classified, based on the Supreme Court's decision in *Egan v. Department of the Navy*, 484 U.S. 518 (1988). In *Egan*, the Court grounded its decision, in large part, on the primacy of the executive branch, under the Constitution, in assessing what information must be classified in the interest of national security. Here, while it is inarguable that Transportation security is highly important, and that Congress directed the agency to identify categories of information that cannot be disclosed, there is no separation of powers question at issue, and, absent issuance of a Final Order upon which the agency based its action, no precedent for foreclosing Board review of the agency's SSI assessment. In fact, the Board has read *Egan* narrowly, and has been loath to extend it to circumstances that do not involve classified information.

to the earlier action or as one whose interests were otherwise fully represented in that action. *See McNeill v. Department of Defense*, 100 M.S.P.R. 146, ¶ 15 (2005). As explained below, however, I agree with the appellant that the issue that the Board must adjudicate in this appeal is not "identical" to that decided by the court of appeals.

First, the agency charged the appellant with disclosing information that was SSI under 49 C.F.R. § 1520.5(8)(ii), a version of the regulation promulgated in 2004, while the Final Order found that his action had disclosed information that was SSI as defined in 49 C.F.R. 1520.7(j), which had been in effect in 2003. Although the two regulations are quite similar, the appellant has submitted evidence that Mr. Colsky, the agency's own expert on SSI, considered the differences between the regulations to be significant. Second, the issue before the 9th Circuit was whether substantial evidence supported the agency's contention that the information the appellant had disclosed amounted to SSI while, before the Board, the agency must prove by preponderant evidence that the information he divulged constituted SSI. *See, e.g., Parikh v. Department of Veterans Affairs*, 2008 WL 5159249 (Dec. 10, 2008) (finding collateral estoppel inapplicable because issues were not identical where issue in first appeal required showing of preponderant evidence and in second appeal standard was nonfrivolous allegation). Because of these differences in the issue presented, I find that collateral estoppel may not be applied to the court's finding to preclude the appellant from chal-

lenging in this appeal whether he divulged information that was SSI.

I conclude that the Board has authority to review the determination in the agency's adverse action that the appellant disclosed information that falls within the regulatory definition of SSI.

(3) Whether the information the appellant disclosed that is the basis for the agency's third "reason" for his removal falls within the meaning of SSI in 49 C.F.R. § 1520.5(8)(ii).

Following review of the argument and existing record evidence, I find this to be a close question. Based on the argument presented, I find it appropriate to hold a ruling on this issue in abeyance until after the parties have an opportunity to present testimony at hearing.

(4) Whether a disclosure of information that is SSI can also be a disclosure protected by the Whistleblower Protection Act under 5 U.S.C. § 2302(b)(8)(A).

The agency argues that a disclosure of SSI is "prohibited by statute and regulation, and as such, Appellant cannot seek the protection of the Whistleblower Protection Act (WPA) to cover his misconduct." The appellant contends that only agency regulations prohibit disclosure of information that is SSI, and that the Board has interpreted the ineligibility of whistleblower protection for disclosures that are "prohibited by law or Executive Order" to apply only to those disclosures not allowed by "statutes and court interpretations of statutes." Both parties have cited *Kent v. General*

Services Administration, 56 M.S.P.R. 536 (1993) in discussing this issue, with the appellant asserting that the holding in the case is directly on point and the agency attempting to distinguish it.

After researching this issue, I agree with the parties that *Kent* appears to be the seminal case on the question of whether agency regulations fall within the ambit of the "prohibited by law" language in 5 U.S.C. § 2302(b)(8)(A). And, after careful consideration, I agree with the agency that the facts in the instant case are distinguishable from those in *Kent* in one important respect, and as a result, a disclosure of information that is SSI under the TSA regulations is a disclosure that is "prohibited by law," and is therefore not "protected" under the WPA. First, I agree with the appellant that *Kent* stands for the general proposition that regulations promulgated by a federal agency do not fall within the term "law" as it is used in the Civil Service Reform Act, as amended by the WPA, and that the Board came to that conclusion in *Kent* after reviewing the construction of the statute and the legislative history. In *Kent*, however, the regulations at issue were the Federal Acquisition Regulations, which are the procurement rules for the federal government that the General Services Administration (GSA) promulgated under a specific delegation of authority by Congress in the Federal Property and Administrative Services Act of 1949. *Kent*, 56 M.S.P.R. at 542. After review of that statute, however, I could find no language requiring GSA to include in its regulations categories of information that may not be disclosed to a third party, as GSA alleged Mr. Kent did in

a charge underlying its action against him. Therefore, at most, Mr. Kent's disclosure(s) violated the regulations, but not the law that mandated them.[3]

In contrast, in the instant case, as the agency points out, Congress required in the ATSA that the agency "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C). Thus, unlike in *Kent*, disclosure of information that is determined to be covered by the SSI regulations also constitutes a disclosure that was explicitly mandated to be prohibited by statute, even if the regulations set the exact parameters, rather than the statute itself. I agree with the agency that it would be an absurd result for Congress to direct TSA to issue regulations prohibiting the disclosure of information that is considered a threat to transportation security, and at the same time to intend that a TSA employee be shielded from discipline by the WPA for violating the regulations by disclosing such information. *See Preyor v. U.S. Postal Service*, 83 M.S.P.R. 571, 580 (1999) (an interpretation of a statute that would lead to absurd results is to be avoided when it can be given a reasonable application consistent with its words and legislative purpose). I find it highly unlikely that Congress would have tasked TSA with

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[3] The fact that the Board found that Mr. Kent's disclosure violated the Trade Secrets Act does not impact the relevant analysis in this order.

prescribing regulations prohibiting the disclosure of SSI if it believed that all regulations lacked the force and effect of "law" for purposes of the WPA, under all circumstances. *See Kligman v. Office of Personnel Management*, 103 M.S.P.R. 614, ¶ 12 (2006) (Congress is assumed to be aware of administrative interpretations of statute). Accordingly, I conclude that the fact that Congress specifically mandated the SSI regulations, unlike in *Kent*, brings the regulations within the definition of "law" in 5 U.S.C. 2302(b)(8)(A), and that a disclosure of information falling within the meaning of the regulations is therefore "prohibited by law," and cannot be a "protected disclosure" under the WPA.

(5) Whether, if the answer to question (4) above is in the affirmative, the appellant's disclosure described in reason 3 of the agency's letter proposing his removal, was "protected" under the WPA.

Not applicable.

(6) Whether the appellant's disclosure in reason 3 of the proposal letter was protected by the First Amendment of the U.S. Constitution, and therefore cannot be the basis for an adverse action.

The parties have cited applicable case law on this issue, which requires the Board to balance the individual and societal interests that are served when employees speak on matters of public concern with the needs of government employers attempting to perform their important public functions. *See Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006); *Chambers v. Department of the Interior*, 103 M.S.P.R. 375 (2006).

Nonetheless, while the parties have made argument on this issue, and I find it likely that I will conclude that the agency had a significant interest in protecting the information at issue in the charge, I find that the record is not sufficiently developed to make a ruling on this issue at this time. Accordingly, I hold in abeyance a ruling on whether the appellant's disclosure was protected by the First Amendment, pending testimony regarding the competing interests at hearing.

It is so **ORDERED**.

FOR THE BOARD: _____

Craig A. Berg
Administrative Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2011-3231

ROBERT J. MACLEAN, PETITIONER

v.

DEPARTMENT OF HOMELAND SECURITY, RESPONDENT

Filed: Aug. 30, 2013

Petition for review of the Merit Systems Protection Board in No. SF0752060611-I-2

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before: RADER, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, MOORE, O'MALLEY, REYNA, WALLACH, and TARANTO, *Circuit Judges.**

PER CURIAM.

ORDER

A combined petition for panel rehearing and rehearing en banc was filed by the respondent Department of Homeland Security, and a response thereto was invited by the court and filed by the petitioner. The petition and response were referred to the panel

that heard the appeal, and thereafter were referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for panel rehearing is denied.

(2) The petition for rehearing en banc is denied.

The mandate of the court will issue on September 6, 2013.

FOR THE COURT

Aug. 30, 2013
Date

/s/ DANIEL E. O'TOOLE
DANIEL E. O'TOOLE
Clerk

* Circuit Judge Chen did not participate.

cc: Lawrence Berger
Thomas M. Devine
Michael P. Goodman
F. Douglas Hartnett
David B. Nolan

APPENDIX H

1. 5 U.S.C. 2302 provides in pertinent part:

Prohibited personnel practices

* * * * *

(b) Any employee who has authority to take, direct others to take, recommend or approve any personnel action, shall not, with respect to such authority—

* * * * *

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

If such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) any violation (other than a violation of this section) of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

* * * * *

2. 49 U.S.C. 114(r) (Supp. V 2011) provides:

Transportation Security Administration

(r) NONDISCLOSURE OF SECURITY ACTIVITIES.—

(1) IN GENERAL.—Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would—

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to the security of transportation.

(2) AVAILABILITY OF INFORMATION TO CONGRESS.—Paragraph (1) does not authorize information to be withheld from a committee of Congress authorized to have the information.

(3) LIMITATION ON TRANSFERABILITY OF DUTIES.—Except as otherwise provided by law, the Under Secretary may not transfer a duty or power under this subsection to another department, agency, or instrumentality of the United States.

(4) LIMITATIONS.—Nothing in this subsection, or any other provision of law, shall be construed to authorize the designation of information as sensitive security information (as defined in section 1520.5 of title 49, Code of Federal Regulations)—

(A) to conceal a violation of law, inefficiency, or administrative error;

(B) to prevent embarrassment to a person, organization, or agency;

(C) to restrain competition; or

(D) to prevent or delay the release of information that does not require protection in the interest of transportation security, including basic scientific research information not clearly related to transportation security.

3. 49 U.S.C. 40119(b) (2000 and Supp. V 2005) provides:

Security and research and development activities

(b) DISCLOSURE.—(1) Notwithstanding section 552 of title 5 and the establishment of a Department of Homeland Security, the Secretary of Transportation shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title if the Secretary of Transportation decides disclosing the information would—

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to transportation safety.

(2) Paragraph (1) of this subsection does not authorize information to be withheld from a committee of Congress authorized to have the information.

4. 49 U.S.C. 40119(b) (2000) provides:

Security and research and development activities

(b) DISCLOSURE.—(1) Notwithstanding section 552 of title 5, the Administrator shall prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security or research and development activities under section 44501(a) or (c), 44502(a)(1) or (3), (b), or (c), 44504, 44505, 44507, 44508, 44511, 44512, 44513, 44901, 44903(a), (b), (c), or

(e), 44905, 44912, 44935, 44936, or 44938(a) or (b) of this title if the Administrator decides disclosing the information would—

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to the safety of passengers in air transportation.

(2) Paragraph (1) of this subsection does not authorize information to be withheld from a committee of Congress authorized to have the information.

5. Pub. L. No. 107-71, § 101(e), 115 Stat. 603 provides:

SEC. 101. TRANSPORTATION SECURITY ADMINISTRATION

(e) SECURITY AND RESEARCH AND DEVELOPMENT ACTIVITIES.— Section 40119 of such title is amended—

(1) in subsection (a) by striking "Administrator of the Federal Aviation Administration" and inserting "Under Secretary of Transportation for Security";

(2) in subsections (b) and (c) by striking "Administrator" each place it appears and inserting "Under Secretary"; and

(3) in subsection (b)(1)(C) by striking "air".

6. 49 C.F.R. 1520 (2002) provides in pertinent part:

* * * * *

§ 1520.5 Records and information protected by others.

(a) *Duty to protect information.* The following persons must restrict disclosure of and access to sensitive security information described in § 1520.7 (a) through (g), (j), (k), and (m) through (r), and, as applicable, § 1520.7 (l) to persons with a need to know and must refer requests by other persons for such information to TSA or the applicable DOT administration:

(1) Each person employed by, contracted to, or acting for a person listed in this paragraph (a).

(2) Each airport operator under part 1542 of this chapter.

(3) Each aircraft operator under part 1544 of this chapter.

(4) Each foreign air carrier under part 1546 of this chapter.

(5) Each indirect air carrier under part 1548 of this chapter.

(6) Each aircraft operator under § 1550.5 of this chapter.

(7) Each person receiving information under § 1520.3 (d).

(8) Each person for which a vulnerability assessment has been authorized, approved, or funded by DOT, irrespective of the mode of transportation.

(b) *Need to know.* For some specific sensitive security information, the Under Secretary may make a finding that only specific persons or classes of persons have a need to know. Otherwise, a person has a need to know sensitive security information in each of the following circumstances:

(1) When the person needs the information to carry out DOT-approved, accepted, or directed security duties.

(2) When the person is in training to carry out DOT-approved, accepted, or directed security duties.

(3) When the information is necessary for the person to supervise or otherwise manage the individuals carrying to carry out DOT-approved, accepted, or directed security duties.

(4) When the person needs the information to advise the persons listed in paragraph (a) of this section regarding any DOT security-related requirements.

(5) When the person needs the information to represent the persons listed in paragraph (a) of this section in connection with any judicial or administrative proceeding regarding those requirements.

(c) *Release of sensitive security information.* When sensitive security information is released to unauthorized persons, any person listed in paragraph (a) of this section or individual with knowledge of the release, must inform DOT.

(d) *Violation.* Violation of this section is grounds for a civil penalty and other enforcement or corrective action by DOT.

(e) *Applicants.* Wherever this part refers to an aircraft operator, airport operator, foreign air carrier, or indirect air carrier, those terms also include applicants for such authority.

(f) *Trainees.* An individual who is in training for a position is considered to be employed by, contracted to, or acting for persons listed in paragraph (a) of this section, regardless of whether that individual is currently receiving a wage or salary or otherwise is being paid.

§ 1520.7 Sensitive security information.

Except as otherwise provided in writing by the Under Secretary as necessary in the interest of safety of persons in transportation, the following information and records containing such information constitute sensitive security information:

(a) Any approved, accepted, or standard security program under the rules listed in § 1520.5(a)(1) through (6), and any security program that relates to United States mail to be transported by air (including that of the United States Postal Service and of the Department of Defense); and any comments, instructions, or implementing guidance pertaining thereto.

(b) Security Directives and Information Circulars under §1542.303 or § 1544.305 of this chapter, and any

comments, instructions, or implementing guidance pertaining thereto.

(c) Any selection criteria used in any security screening process, including for persons, baggage, or cargo under the rules listed in § 1520.5(a)(1) through (6).

(d) Any security contingency plan or information and any comments, instructions, or implementing guidance pertaining thereto under the rules listed in § 1520.5(a)(1) through (6).

(e) Technical specifications of any device used for the detection of any deadly or dangerous weapon, explosive, incendiary, or destructive substance under the rules listed in § 1520.5(a)(1) through (6).

(f) A description of, or technical specifications of, objects used to test screening equipment and equipment parameters under the rules listed in § 1520.5(a)(1) through (6).

(g) Technical specifications of any security communications equipment and procedures under the rules listed in § 1520.5(a)(1) through (6).

(h) As to release of information by TSA: Any information that TSA has determined may reveal a systemic vulnerability of the aviation system, or a vulnerability of aviation facilities, to attack. This includes, but is not limited to, details of inspections, investigations, and alleged violations and findings of violations of 14 CFR parts 107, 108, or 109 and 14 CFR 129.25, 129.26, or 129.27 in effect prior to November 14, 2001 (see 14 CFR parts 60 to 139 revised as of

January 1, 2001); or parts 1540, 1542, 1544, 1546, 1548, or § 1550.5 of this chapter, and any information that could lead the disclosure of such details, as follows:

(1) As to events that occurred less than 12 months before the date of the release of the information, the following are not released: the name of an airport where a violation occurred, the regional identifier in the case number, a description of the violation, the regulation allegedly violated, and the identity of the aircraft operator in connection with specific locations or specific security procedures. TSA may release summaries of an aircraft operator's total security violations in a specified time range without identifying specific violations. Summaries may include total enforcement actions, total proposed civil penalty amounts, total assessed civil penalty amounts, number of cases opened, number of cases referred to TSA or FAA counsel for legal enforcement action, and number of cases closed.

(2) As to events that occurred 12 months or more before the date of the release of information, the specific gate or other location on an airport where an event occurred is not released.

(3) The identity of TSA or FAA special agent who conducted the investigation or inspection.

(4) Security information or data developed during TSA or FAA evaluations of the aircraft operators and airports and the implementation of the security programs, including aircraft operator and airport inspections and screening point tests or methods for evalu-

ating such tests under the rules listed in § 1520.5(a)(1) through (6).

(i) As to release of information by TSA: Information concerning threats against transportation.

(j) Specific details of aviation security measures whether applied directly by the TSA or entities subject to the rules listed in § 1520.5(a)(1) through (6). This includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.

(k) Any other information, the disclosure of which TSA has prohibited under the criteria of 49 U.S.C. 40119.

(l) Any draft, proposed, or recommended change to the information and records identified in this section.

(m) The locations at which particular screening methods or equipment are used under the rules listed in § 1520.5(a)(1) through (6) if TSA determines that the information meets the criteria of 49 U.S.C. 40119.

(n) Any screener test used under the rules listed in § 1520.5(a)(1) through (6).

(o) Scores of tests administered under the rules listed in § 1520.5(a)(1) through (6).

(p) Performance data from screening systems, and from testing of screening systems under the rules listed in § 1520.5(a)(1) through (6).

(q) Threat images and descriptions of threat images for threat image projection systems under the rules listed in § 1520.5(a)(1) through (6).

(r) Information in a vulnerability assessment that has been authorized, approved, or funded by DOT, irrespective of mode of transportation.

7. 49 C.F.R. 1520 provides in pertinent part:

* * * * *

§1520.5 Sensitive security information.

(a) *In general.* In accordance with 49 U.S.C. 114(s), SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would—

(1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file);

(2) Reveal trade secrets or privileged or confidential information obtained from any person; or

(3) Be detrimental to the security of transportation.

(b) *Information constituting SSI.* Except as otherwise provided in writing by TSA in the interest of public safety or in furtherance of transportation secu-

rity, the following information, and records containing such information, constitute SSI:

(1) *Security programs and contingency plans.* Any security program or security contingency plan issued, established, required, received, or approved by DOT or DHS, including any comments, instructions, or implementing guidance, including—

(i) Any aircraft operator, airport operator, fixed base operator, or air cargo security program, or security contingency plan under this chapter;

(ii) Any vessel, maritime facility, or port area security plan required or directed under Federal law;

(iii) Any national or area security plan prepared under 46 U.S.C. 70103; and

(iv) Any security incident response plan established under 46 U.S.C. 70104.

(2) *Security Directives.* Any Security Directive or order—

(i) Issued by TSA under 49 CFR 1542.303, 1544.305, 1548.19, or other authority;

(ii) Issued by the Coast Guard under the Maritime Transportation Security Act, 33 CFR part 6, or 33 U.S.C. 1221 *et seq.* related to maritime security; or

(iii) Any comments, instructions, and implementing guidance pertaining thereto.

(3) *Information Circulars.* Any notice issued by DHS or DOT regarding a threat to aviation or maritime transportation, including any—

(i) Information circular issued by TSA under 49 CFR 1542.303, 1544.305, 1548.19, or other authority; and

(ii) Navigation or Vessel Inspection Circular issued by the Coast Guard related to maritime security.

(4) *Performance specifications.* Any performance specification and any description of a test object or test procedure, for—

(i) Any device used by the Federal Government or any other person pursuant to any aviation or maritime transportation security requirements of Federal law for the detection of any person, and any weapon, explosive, incendiary, or destructive device, item, or substance; and

(ii) Any communications equipment used by the Federal government or any other person in carrying out or complying with any aviation or maritime transportation security requirements of Federal law.

(5) *Vulnerability assessments.* Any vulnerability assessment directed, created, held, funded, or approved by the DOT, DHS, or that will be provided to DOT or DHS in support of a Federal security program.

(6) *Security inspection or investigative information.* (i) Details of any security inspection or investigation of an alleged violation of aviation, maritime, or rail transportation security requirements of Federal law that could reveal a security vulnerability, including the identity of the Federal special agent or other Federal employee who conducted the inspection or audit.

(ii) In the case of inspections or investigations performed by TSA, this includes the following information as to events that occurred within 12 months of the date of release of the information: the name of the airport where a violation occurred, the airport identifier in the case number, a description of the violation, the regulation allegedly violated, and the identity of any aircraft operator in connection with specific locations or specific security procedures. Such information will be released after the relevant 12-month period, except that TSA will not release the specific gate or other location on an airport where an event occurred, regardless of the amount of time that has passed since its occurrence. During the period within 12 months of the date of release of the information, TSA may release summaries of an aircraft operator's, but not an airport operator's, total security violations in a specified time range without identifying specific violations or locations. Summaries may include total enforcement actions, total proposed civil penalty amounts, number of cases opened, number of cases referred to TSA or FAA counsel for legal enforcement action, and number of cases closed.

(7) *Threat information.* Any information held by the Federal government concerning threats against transportation or transportation systems and sources and methods used to gather or develop threat information, including threats against cyber infrastructure.

(8) *Security measures.* Specific details of aviation, maritime, or rail transportation security measures, both operational and technical, whether applied

directly by the Federal government or another person, including—

(i) Security measures or protocols recommended by the Federal government;

(ii) Information concerning the deployments, numbers, and operations of Coast Guard personnel engaged in maritime security duties and Federal Air Marshals, to the extent it is not classified national security information; and

(iii) Information concerning the deployments and operations of Federal Flight Deck Officers, and numbers of Federal Flight Deck Officers aggregated by aircraft operator.

(iv) Any armed security officer procedures issued by TSA under 49 CFR part 1562.

(9) *Security screening information.* The following information regarding security screening under aviation or maritime transportation security requirements of Federal law:

(i) Any procedures, including selection criteria and any comments, instructions, and implementing guidance pertaining thereto, for screening of persons, accessible property, checked baggage, U.S. mail, stores, and cargo, that is conducted by the Federal government or any other authorized person.

(ii) Information and sources of information used by a passenger or property screening program or system, including an automated screening system.

(iii) Detailed information about the locations at which particular screening methods or equipment are used, only if determined by TSA to be SSI.

(iv) Any security screener test and scores of such tests.

(v) Performance or testing data from security equipment or screening systems.

(vi) Any electronic image shown on any screening equipment monitor, including threat images and descriptions of threat images for threat image projection systems.

(10) *Security training materials.* Records created or obtained for the purpose of training persons employed by, contracted with, or acting for the Federal government or another person to carry out aviation, maritime, or rail transportation security measures required or recommended by DHS or DOT.

(11) *Identifying information of certain transportation security personnel.* (i) Lists of the names or other identifying information that identify persons as—

(A) Having unescorted access to a secure area of an airport, a rail secure area, or a secure or restricted area of a maritime facility, port area, or vessel;

(B) Holding a position as a security screener employed by or under contract with the Federal government pursuant to aviation or maritime transportation security requirements of Federal law, where such lists are aggregated by airport;

(C) Holding a position with the Coast Guard responsible for conducting vulnerability assessments, security boardings, or engaged in operations to enforce maritime security requirements or conduct force protection;

(D) Holding a position as a Federal Air Marshal; or

(ii) The name or other identifying information that identifies a person as a current, former, or applicant for Federal Flight Deck Officer.

(12) *Critical aviation, maritime, or rail infrastructure asset information.* Any list identifying systems or assets, whether physical or virtual, so vital to the aviation, maritime, or rail transportation system (including rail hazardous materials shippers and rail hazardous materials receivers) that the incapacity or destruction of such assets would have a debilitating impact on transportation security, if the list is—

(i) Prepared by DHS or DOT; or

(ii) Prepared by a State or local government agency and submitted by the agency to DHS or DOT.

(13) *Systems security information.* Any information involving the security of operational or administrative data systems operated by the Federal government that have been identified by the DOT or DHS as critical to aviation or maritime transportation safety or security, including automated information security procedures and systems, security inspections, and vulnerability information concerning those systems.

(14) *Confidential business information.* (i) Solicited or unsolicited proposals received by DHS or DOT, and negotiations arising therefrom, to perform work pursuant to a grant, contract, cooperative agreement, or other transaction, but only to the extent that the subject matter of the proposal relates to aviation or maritime transportation security measures;

(ii) Trade secret information, including information required or requested by regulation or Security Directive, obtained by DHS or DOT in carrying out aviation or maritime transportation security responsibilities; and

(iii) Commercial or financial information, including information required or requested by regulation or Security Directive, obtained by DHS or DOT in carrying out aviation or maritime transportation security responsibilities, but only if the source of the information does not customarily disclose it to the public.

(15) *Research and development.* Information obtained or developed in the conduct of research related to aviation, maritime, or rail transportation security activities, where such research is approved, accepted, funded, recommended, or directed by DHS or DOT, including research results.

(16) *Other information.* Any information not otherwise described in this section that TSA determines is SSI under 49 U.S.C. 114(s) or that the Secretary of DOT determines is SSI under 49 U.S.C. 40119. Upon the request of another Federal agency, TSA or the

Secretary of DOT may designate as SSI information not otherwise described in this section.

(c) *Loss of SSI designation.* TSA or the Coast Guard may determine in writing that information or records described in paragraph (b) of this section do not constitute SSI because they no longer meet the criteria set forth in paragraph (a) of this section.

* * * * *

§1520.9 Restrictions on the disclosure of SSI.

(a) *Duty to protect information.* A covered person must—

(1) Take reasonable steps to safeguard SSI in that person's possession or control from unauthorized disclosure. When a person is not in physical possession of SSI, the person must store it a secure container, such as a locked desk or file cabinet or in a locked room.

(2) Disclose, or otherwise provide access to, SSI only to covered persons who have a need to know, unless otherwise authorized in writing by TSA, the Coast Guard, or the Secretary of DOT.

(3) Refer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS.

(4) Mark SSI as specified in §1520.13.

(5) Dispose of SSI as specified in §1520.19.

(b) *Unmarked SSI.* If a covered person receives a record containing SSI that is not marked as specified in §1520.13, the covered person must—

(1) Mark the record as specified in §1520.13; and

(2) Inform the sender of the record that the record must be marked as specified in §1520.13.

(c) *Duty to report unauthorized disclosure.* When a covered person becomes aware that SSI has been released to unauthorized persons, the covered person must promptly inform TSA or the applicable DOT or DHS component or agency.

(d) *Additional Requirements for Critical Infrastructure Information.* In the case of information that is both SSI and has been designated as critical infrastructure information under section 214 of the Homeland Security Act, any covered person who is a Federal employee in possession of such information must comply with the disclosure restrictions and other requirements applicable to such information under section 214 and any implementing regulations.

§1520.11 Persons with a need to know.

(a) *In general.* A person has a need to know SSI in each of the following circumstances:

(1) When the person requires access to specific SSI to carry out transportation security activities approved, accepted, funded, recommended, or directed by DHS or DOT.

(2) When the person is in training to carry out transportation security activities approved, accepted, funded, recommended, or directed by DHS or DOT.

(3) When the information is necessary for the person to supervise or otherwise manage individuals

carrying out transportation security activities approved, accepted, funded, recommended, or directed by the DHS or DOT.

(4) When the person needs the information to provide technical or legal advice to a covered person regarding transportation security requirements of Federal law.

(5) When the person needs the information to represent a covered person in connection with any judicial or administrative proceeding regarding those requirements.

(b) *Federal, State, local, or tribal government employees, contractors, and grantees.* (1) A Federal, State, local, or tribal government employee has a need to know SSI if access to the information is necessary for performance of the employee's official duties, on behalf or in defense of the interests of the Federal, State, local, or tribal government.

(2) A person acting in the performance of a contract with or grant from a Federal, State, local, or tribal government agency has a need to know SSI if access to the information is necessary to performance of the contract or grant.

(c) *Background check.* TSA or Coast Guard may make an individual's access to the SSI contingent upon satisfactory completion of a security background check or other procedures and requirements for safeguarding SSI that are satisfactory to TSA or the Coast Guard.

(d) *Need to know further limited by the DHS or DOT.* For some specific SSI, DHS or DOT may make a finding that only specific persons or classes of persons have a need to know.

* * * * *

§1520.17 Consequences of unauthorized disclosure of SSI.

Violation of this part is grounds for a civil penalty and other enforcement or corrective action by DHS, and appropriate personnel actions for Federal employees. Corrective action may include issuance of an order requiring retrieval of SSI to remedy unauthorized disclosure or an order to cease future unauthorized disclosure.

* * * * *

OPPOSITION BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAR 2 8 2014
OFFICE OF THE CLERK

No. 13-894

IN THE
Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY,
Petitioner,

v.

ROBERT J. MACLEAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In recognition of the crucial role federal employees play in uncovering unlawful, wasteful, and dangerous government activity, Congress has enacted strong protections for government whistleblowers. One such provision provides that agencies may not retaliate against employees who disclose information revealing, among other things, "any violation of any law, rule, or regulation" or "a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A). There is an exception, however, for "disclosure[s] * * * specifically prohibited by law" or by certain Executive orders. *Id.*

Disclosure of certain kinds of sensitive but unclassified information, referred to as "Sensitive Security Information," is prohibited by regulation. *See* 49 C.F.R. Pt. 1520. Those regulations are promulgated pursuant to a general statutory delegation of authority. *See* 49 U.S.C.A. § 114(r)(1).

The question presented is whether a disclosure of Sensitive Security Information is "specifically prohibited by law" within the meaning of Section 2302(b)(8)(A).

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IN THE

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No. 13-894

DEPARTMENT OF HOMELAND SECURITY,

Petitioner,

v.

ROBERT J. MACLEAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION

INTRODUCTION

Respondent Robert MacLean was a federal air marshal who spoke up about the consequences of a dangerous and possibly unlawful government decision. Because he blew the whistle, the government changed policy and a potential tragedy was averted. But Mr. MacLean paid a hefty price. MacLean's employer, Petitioner Department of Homeland Security ("DHS"), fired him.

Whistleblower-protection laws were enacted to prevent exactly this result. Government employees who come forward with information about dangerous or unlawful government activity are statutorily protected against retaliation unless their disclosure was "specifically prohibited by law" or by certain Execu-

tive orders. Attempting to get around this broad protection against retaliation, DHS maintained that MacLean's disclosure of information related to transportation security was "specifically prohibited by law."

The Court of Appeals rejected DHS's argument. DHS had conceded that "law" in this context means statute, not regulation. And the only statute DHS relied on, the court concluded, was not a "specific[ ]" prohibition. That decision was unanimous. And no judge dissented from denial of DHS's petition for rehearing *en banc*.

DHS's petition for *certiorari* should be denied. Most importantly, DHS's primary argument is clearly waived. DHS expressly and repeatedly conceded in prior proceedings that a disclosure must be prohibited by statute—not merely by regulation—to be "specifically prohibited by law." It now contends the exact opposite, attempting to reclaim the ground it conceded and argue that "law" includes regulations. That argument is not properly before this Court.

In any event, it is meritless. The Court of Appeals correctly held that MacLean's disclosure was not "specifically prohibited by law" within the meaning of the statute at issue. The text, structure, purpose, and legislative history of that provision make two things absolutely clear: The exception applies only to disclosures that are prohibited by statute, and it applies only when that prohibition is "specific[ ]." The only statute on which DHS relies, the Court of Appeals rightly concluded, did not "specifically prohibit" MacLean's disclosure.

DHS acknowledges that there is no circuit split on this issue. Indeed, not a single circuit judge has adopted DHS's view of the statute. DHS nevertheless insists that this Court's review is necessary. Letting the decision below stand, it claims, would threaten transportation security. But as Congress has long recognized, protecting whistleblowers serves, rather than undermines, public safety. MacLean is a case in point: Air travel is safer, not less safe, because he came forward. The decision below, moreover, is far narrower than DHS would make it seem. It applies only to the very limited set of employee disclosures that meet all of the requirements for whistleblower protection, and it does not even finally resolve this case.

The petition should be denied.

STATEMENT

A. Whistleblower Protection

In 1978, amidst ongoing expansion of the administrative state and mounting concern over concealed government misconduct, Congress recognized the limits of its own ability to uncover wrongdoing within "the vast Federal bureaucracy." S. Rep. No. 95-969, at 8 (1978) ("Senate Report"). So it turned for help to those individuals best able to bring illegal, wasteful, and dangerous government activity to light: government employees. Congress realized, though, that employees who "summon[ ] the courage to disclose the truth" are often rewarded only with "harassment and abuse." *Id.* Empowering employees to come forward, it recognized, would require "a means to assure them that they will not suffer if they help uncover and correct administrative abuses." *Id.*

And with that recognition, protection for government whistleblowers—"[f]ederal employees who disclose illegal or improper government activities," *id.*—was born.

It began with the Civil Service Reform Act of 1978 ("CSRA"), Pub L. No. 95-454, 92 Stat. 1111, which established what would prove to be the core protections for government whistleblowers. And over the years, Congress has continually strengthened those protections as agencies have inevitably resisted them. In 1989, Congress unanimously passed the Whistleblower Protection Act of 1989 ("WPA"), Pub L. No. 101-12, 103 Stat. 16, "to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government." *Id.* at § 2(b), 103 Stat. 16. Just five years later, Congress again reinforced whistleblower protections by unanimous vote. *See* An Act To Reauthorize The Office Of Special Counsel, And For Other Purposes, Pub. L. No. 103-424, 108 Stat. 4361 (1994). And most recently, Congress passed the Whistleblower Protection Enhancement Act of 2012 ("WPEA"), Pub. L. No. 112-199, 126 Stat. 1465, "to reform and strengthen several aspects of the whistleblower protection statutes in order to achieve the original intent and purpose of the laws." S. Rep. No. 112-155, at 3-4 (2012). In particular, the WPEA aimed to "overturn[ ] several court decisions that narrowed the scope of protected disclosures." *Id.* at 5.

This case is about one of the most important whistleblower protections established and continually reaffirmed through this series of Acts: 5 U.S.C. § 2302(b)(8)(A). Section 2302(b)(8)(A)—which,

though first enacted in the CSRA, is commonly referred to as part of the WPA—prohibits agencies from taking specified "personnel action[s]" against an employee in retaliation for:

> any disclosure of information by an employee * * * which the employee * * * reasonably believes evidences—
>
> (i) any violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs * * * .

5 U.S.C. § 2302(b)(8)(A). The idea is simple: Except in limited circumstances where Congress or the President has determined that the costs of disclosure outweigh its benefits, government employees should be encouraged to make disclosures that serve the public welfare. And when they do so, the agencies that employ them should be prevented from retaliating. The result is a safer, more law-abiding, and more efficient administrative state.

Of course, the agencies themselves are not always on board. Agencies and their officers often have strong incentives to conceal wrongdoing, and employees who spill the beans are not always treated kindly. *See* Senate Report at 8 ("Whistle blowers frequently encounter severe damage to their careers

and substantial economic loss."). That is why whistleblowers need protection in the first place.

So it makes perfect sense that Section 2302(b)(8)(A) only exempts disclosures prohibited by congressional or presidential decree. Agency regulations are not included in the exception. Otherwise, agencies could regulate their way out of the public scrutiny whistleblower-protection laws were meant to facilitate. Indeed, Congress rejected an initial draft of this provision that would have created a broader exception to whistleblower protection. Instead of exempting disclosures "prohibited by law, rule or regulation," as the original versions of the CSRA provided, *see* H.R. 11280, 95th Cong. (2d Sess. 1978); S. 2640, 95th Cong. (2d Sess. 1978), the final version of statute exempts only those disclosures "specifically prohibited by law" or certain Executive orders, 5 U.S.C. § 2302(b)(8)(A). "[S]pecifically prohibited by law," the Conference Report explains, "does not refer to agency rules and regulations." H.R. Rep. No. 95-1717, at 130 (1978) (Conf. Rep.) ("Conference Report").

B. Sensitive Security Information

Regulations governing the disclosure of information related to air-transportation security predate the CSRA. *See, e.g.*, 14 C.F.R. Pt. 191 (1976). These regulations were originally promulgated by the Federal Aviation Administration and subsequently transferred to the jurisdiction of the Transportation Security Administration ("TSA"), which has been part of DHS since DHS's creation in 2002. *See* 67 Fed. Reg. 8351 (Feb. 22, 2002). TSA's authority to promulgate SSI regulations stems from a statutory provision that provides:

> Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security * * * if the Under Secretary decides that disclosing the information would * * * be detrimental to the security of transportation.

49 U.S.C. § 114(r)(1); *see also* 49 U.S.C. 40119(b)(1).

The first five words of the statute illuminate its primary purpose. Section 552 of title 5 is the Freedom of Information Act ("FOIA"), and Congress enacted Section 114(r) out of concern that ill-intentioned individuals would gain access to sensitive information through FOIA requests. *See Public Citizen, Inc.* v. *FAA*, 988 F.2d 186, 194-96 (D.C. Cir. 1993) (analyzing the predecessor statute and explaining that blocking FOIA requests was a driving force behind its passage). To this end, Section 114(r) authorizes TSA to promulgate regulations prohibiting the disclosure of certain air-security information. But the statute itself neither directly prohibits disclosures nor specifically defines what information is covered.

Regulations impose detailed restrictions that fill in these statutory gaps. They provide a comprehensive framework defining the scope of covered information—generally referred to as "Sensitive Security Information" or "SSI"—and restrict its use and dissemination. *See* 49 C.F.R. Pt. 1520. During the time period relevant to this case, the regulations defined SSI to include, among other things, "information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods

involved in such operations." 49 C.F.R. § 1520.7(j) (2003).

C. Underlying Facts

Robert MacLean was a government servant with a fourteen-year record of exemplary federal service. After four years' active duty in the Air Force, he worked as a border patrol agent from 1996 through 2001. *See* C.A. App. A184. When the planes hit the towers on September 11, MacLean was inspired to serve his country in a new way. *Id.* at A185-86. He applied to work for the organization that would shortly become the Federal Air Marshals Service ("FAMS")—a federal law-enforcement agency currently within TSA—and became a member of the Service's first post-9/11 graduating class. *Id.*; Pet. App. 2a, 20a.

As an air marshal, MacLean's job was "to detect, deter, and defeat hostile acts targeting U.S. air carriers, airports, passengers, and crews." *Federal Air Marshals*, TSA, *available at* http://www.tsa.gov/about-tsa/federal-air-marshals. Marshals operate independently and aim to blend in with ordinary travelers. *See id.* They are trained in "investigative techniques, criminal terrorist behavior recognition, firearms proficiency, aircraft specific tactics, and close quarters self-defense measures," among other things. *Id.* Proud to protect the flying public, MacLean served without incident until 2003.

In late July of that year, DHS issued an emergency, non-public notice of a specific and imminent terrorist threat focused on long-distance flights—a more ambitious, broader-scale version of the 9/11 plot. Pet. App. 2a; C.A. App. A98-99, A187-89.

Every air marshal, including MacLean, was given an unprecedented face-to-face briefing about the threat. Pet. App. 2a; C.A. App. A187-89. MacLean and the other marshals were informed about special measures being implemented to thwart the attack and were told to be especially on their guard. C.A. App. A187-89.

So imagine MacLean's alarm when, within forty-eight hours of the secret briefing, he received an unencrypted text message that cancelled "all overnight missions" for several days. Pet. App. 2a; C.A. App. A187-95. The text message was not marked as sensitive information; it was unencrypted; and it was sent to MacLean's unsecure cell phone, not the secure personal digital assistant TSA had provided for SSI transmission. C.A. App. A189-90, A196-200. MacLean at first thought the message must have been a joke or mistake. After all, TSA is statutorily required to station a marshal on flights that "present high security risks," 49 U.S.C. § 44917(a)(1)-(2), and marshal deployment on "nonstop, long distance flights * * * should be a priority." 49 U.S.C. § 44917(b). The looming hijacking threat only made marshal coverage of long-distance flights all the more imperative.

After confirming that other marshals had received the same message, MacLean went to his supervisor for answers. Pet. App. 2a; C.A. App. A204-05. All the supervisor could tell him, however, was that overnight missions had been eliminated due to a budget shortfall and there was nothing that could be done about it. C.A. App. A206, A211. But with lives hanging the balance, MacLean did not give up so easily. His office was full of posters exhorting that

violations of the law should be reported to the Office of the Inspector General ("OIG"), so that was where he went next. *Id.* at A211-12. His call was transferred from one OIG field office to another, and he was ultimately advised to think about the "years left in [his] career" and simply "walk away." *Id.* at A212-13.

Only then did MacLean look outside the administration for help. He firmly believed that FAMS's directive was contrary to law and presaged catastrophe. And time was running out. If no one within the administration would listen, MacLean would have to find a way to get Congress's attention. So he blew the whistle. MacLean contacted a reporter with a history of responsible reporting on TSA and connections with Congress. *Id.* at A213, A216-17. MacLean told the reporter about the text message, but he did not reveal details about any specific flight or any marshal's identity. *Id.* at A191-93. The reporter promised to contact members of Congress immediately and to publicize the issue. *Id.* at A216-17.

It worked. The story was published and congressional leaders reacted immediately. Pet. App. 2a; C.A. App. A135, A148-54. They expressed deep concern and outrage about DHS's decision and urged the Agency to reconsider. *See, e.g.*, C.A. App. A148 (statement of Sen. Hillary Clinton); *id.* at A149 (statement of Sen. Frank Lautenberg); *id.* at A150 (statement of Sen. Charles Schumer); *id.* at A152-53 (statement of Rep. Carolyn Maloney). And it did. Within 24 hours, DHS rescinded the directive, announcing that its issuance had been "premature and a mistake." *Id.* at A155. Marshal coverage was uninterrupted, and a potential hijacking threat was

averted—all because MacLean had the courage to blow the whistle. Senator Barbara Boxer specifically thanked the anonymous air marshal "who came forward and told the truth." *Id.* at A154.

MacLean's good deed ultimately did not go unpunished. He was not in it for the publicity, and he did not draw attention to himself as the source that Senator Boxer and others had praised. Initially, no one identified him as the source of the anonymous disclosure, and he went back to work protecting air travelers. In the ensuing years and as result of his experience, MacLean became actively involved with the Federal Law Enforcement Officers Association ("FLEOA") and its efforts to reform dangerous FAMS practices and to prevent recurring security breaches. Pet. App. 22a. As part of these efforts, he appeared anonymously on a television news broadcast to criticize FAMS policies that rendered marshals easily identifiable to would-be terrorists. *Id.* FLEOA's and MacLean's efforts eventually prompted a congressional committee report and an investigation by the Office of Special Counsel into these issues.

Needless to say (and just as Congress had anticipated when it instituted whistleblower protections), DHS was less than pleased with the public criticism. When MacLean's voice was recognized during his anonymous news appearance, the Agency took the opportunity to initiate an internal investigation. In May 2005, MacLean was interviewed by DHS investigators, and he confirmed that he had made the appearance in question. Pet. App. 2a-3a, 22a. MacLean was not directly asked about the July 2003 text message and news story. But thinking he had

done nothing wrong and wanting to be fully candid, he offered the details of his involvement in response to questions about his prior media contacts. *See id.* at 22a.

The information MacLean had volunteered would end up costing him his job. In September 2005, DHS proposed to remove him from his post on three grounds: (1) his news appearance had been unauthorized, (2) other media communications had been unauthorized, and (3) the text message he disclosed to the reporter contained SSI. *See id.* at 22a-23a; C.A. App. A27-29. In April 2006, the Agency sustained his removal on the third charge only. Pet. App. 23a.

D. Procedural History

MacLean challenged his removal before the Merit Systems Protection Board ("MSPB") on several grounds—chief among them, that the text message did not in fact contain SSI and, even if it did, his disclosure was protected by the WPA. But before the MSPB could rule on these issues, TSA issued an *ex post*, conclusory, two-page order formally designating the text message MacLean had disclosed as SSI. TSA issued the order *three years* after the text message was sent, and it provided neither notice nor opportunity to comment. *See MacLean* v. *DHS*, 543 F.3d 1145, 1149 (9th Cir. 2008).

MacLean appealed the order to the Ninth Circuit, and the MSPB dismissed his initial action without prejudice pending the Ninth Circuit's ruling. *See id.* Emphasizing the considerable deference afforded to an agency's interpretation of its own regulations, the Ninth Circuit upheld DHS's determination that the

text message contained SSI. *See id.* at 1150. It stressed, however, that MacLean could "still contest his termination before the MSPB, where he [could] raise the Whistleblower Protection Act" or argue that he held "a good faith belief that the information did not qualify as 'sensitive security information.'" *Id.* at 1152.

So MacLean went back to the MSPB, again challenging his removal on numerous grounds. The administrative judge ("AJ") issued an initial order concluding, among other things, that SSI disclosures are not protected by the WPA. Pet. App. 160a-63a. The full Board affirmed that ruling on interlocutory appeal. *See id.* at 128a-39a. Because MacLean's disclosure was prohibited by the "regulations governing SSI," the Board reasoned, it was specifically "prohibited by law" within the meaning of the WPA. *Id.* at 139a. Having decided this preliminary question, the Board remanded for the AJ to resolve the remaining issues. *Id.*

The AJ ultimately upheld MacLean's removal. *Id.* at 57a-112a. The case came back to the full Board on appeal, and the Board affirmed. *Id.* 19a-55a. But in so doing, the Board reconsidered and modified its interlocutory ruling. *See* Pet. App. 32a-37a. Although the interlocutory decision might be read to hold that all regulations count as "law" for purposes of Section 2302(b)(8)(A)'s exception, the Board explained that such a result would be inconsistent with the WPA's purpose. *Id.* at 32a. Only disclosures prohibited by regulations "promulgated pursuant to an explicit Congressional mandate," the Board clarified, qualify under the WPA exception. *Id.*

MacLean appealed the Board's decision to the Court of Appeals for the Federal Circuit, which reversed. The court began its WPA analysis by emphasizing that "[t]he parties do not dispute that, in order to fall under the WPA's 'specifically prohibited by law' proviso, the disclosure must be prohibited by a statute rather than by a regulation." *Id.* at 12a. And it went on to conclude that no statute "specifically prohibited" MacLean's disclosure. *Id.* at 13a. The court thus vacated the MSPB's decision and remanded for further proceedings. *Id.* at 17a.

DHS sought panel rehearing and rehearing *en banc*. DHS's petition was denied without opinion and without dissent. Pet. App. 165a-66a. The instant petition for *certiorari* followed.

Notably, this case is still pending on remand before the MSPB. The Court of Appeals decided only that MacLean's disclosure does not fall within the Section 2302(b)(8)(A) exception; it remains to be seen whether he meets the other criteria for whistleblower protection. In order to ultimately prevail, MacLean still must demonstrate, among other things, that he "reasonably believed that the content of his disclosure evidenced a substantial and specific danger to public health or safety." *Id.* at 17a.

REASONS FOR DENYING THE WRIT

I. DHS WAIVED ITS PRIMARY ARGUMENT.

1. The petition's first and primary argument is that MacLean's disclosure was "specifically prohibited by law"—and thus outside the scope of whistleblower protection—because it was barred by the SSI regulations. Pet. 12-16. "[T]he term 'law,' " DHS argues, "is not limited to congressional enactments." *Id.* at

14. This argument was not merely waived below, it was expressly and repeatedly conceded.

The Court of Appeals certainly saw it that way. The court began its analysis by emphasizing that "[t]he parties *do not dispute* that, in order to fall under the WPA's 'specifically prohibited by law' proviso, the disclosure must be prohibited by a statute rather than a regulation." Pet. App. 12a (emphasis added). "[T]he parties *agree*," the court went on, that "a regulation * * * cannot be 'law' under the WPA." *Id.* at 13a (emphasis added). The only issue on appeal, accordingly, was "whether [a statute] 'specifically prohibit[s]' disclosure of information concerning coverage of flights by Marshals within the meaning of the WPA." *Id.* at 12a (second alteration in original).

That has always been the only issue in this case. As DHS itself explained in its Court of Appeals brief, that is how the MSPB conceived of the question. "The best way to understand the Board's holding," DHS emphasized, "is that the 'law' that specifically prohibits the disclosure of SSI is the *statute* passed by Congress and codified at 49 U.S.C. § 40119 and 49 U.S.C. § 114(r)." Gov't C.A. Br. 45 (emphasis added). And DHS defended the MSPB's decision on the ground that it "maintains the limit upon the applicability of the 'specifically prohibited by law' provision to statutes." *Id.* at 45-46. The scope of DHS's argument could not have been clearer:

> *Amici* argue that in order to exempt certain disclosures from WPA protection, "Congress must have explicitly prohibited such a disclosure via legislative enactment." Am. Br. at 9. *We do not*

> *disagree. The only dispute is whether 49 U.S.C. § 40119 serves as that legislative enactment.*

Id. at 46-47 (emphasis added). DHS reiterated that concession at oral argument:

> Question: * * * I thought I understood your brief as conceding that when this particular portion of the WPA says "not specifically pro[hibit]ed by law"—I thought I understood your brief to concede that that can't be a rule or regulation, it means statute. Am I wrong?
>
> Answer: You're not wrong your honor. I'll be as clear as I can. *"Specifically prohibited by law" here means statute.* But it doesn't mean that the statute can't direct the agency to pass regulations. So we think "specifically prohibited by" means that the statute is specifically saying you can't disclose something. It's nondisclosure statutes is what it's getting at.

C.A. Oral Arg. Rec. 22:33-23:17 (emphasis added).

Even after the panel took DHS at its word and noted the parties' agreement at multiple points in its opinion, *see* Pet. App. 12a-13a, DHS did not object. To the contrary, DHS's petition for rehearing continued to argue that MacLean's disclosure was prohibited by statute. It did not dispute the panel's characterization of the parties' agreement or the question in dispute. This notwithstanding that the Federal Rules of Appellate Procedure provide that petitions for rehearing "must state with particularity *each* point of law or fact that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(a)(2) (emphasis added).

2. DHS acknowledges that its "argument in the court of appeals did focus principally on the statute as the relevant source of 'law.' " Pet. 15-16. Indeed, DHS's petition characterizes its own lower-court brief as "*agreeing* that the proviso applies only when Congress has 'explicitly prohibited' a particular disclosure 'via legislative enactment' and characterizing the dispute as 'whether 49 U.S.C. § 40119 serves as that legislative enactment.' " *Id.* at 16 (quoting Gov't C.A. Br. 46-47) (emphasis added). Nevertheless, DHS attempts to evade its repeated concession by quoting portions of its lower court briefs that refer to regulations adopted "pursuant to a specific Congressional mandate to do so." *Id.* (quoting Gov't C.A. Br. 48).

But DHS cannot distinguish its primary position here from the position it disclaimed below. In pages 12 through 16 of its petition, DHS stakes out its main argument. Relying on this Court's decision in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), which construed the phrase "authorized by law" to cover regulations, DHS now argues simply that "the regulations in this case can be 'law' for purposes of the Section 2302(b)(8)(A) proviso." Pet. 15; *see also id.* at 14 ("[T]he term 'law' is not limited to congressional enactments."). This is the exact opposite of the position it took below: " 'Specifically prohibited by law' here means statute." C.A. Oral Arg. Rec. 22:33-23:17; *see also* Gov't C.A. Br. at 46-48; Pet. App. 12a-13a.

Waiver rules are central to the integrity of our justice system. *See Greenlaw* v. *United States*, 554 U.S. 237, 243-44 (2008) ("Our adversary system is designed around the premise that the parties know

what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." (internal quotation marks and alteration omitted)). And it is axiomatic that a party cannot take one position in a lower court and then, unhappy with the result, come to this Court with the opposite theory. *See Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981) (noting that an issue "not raised [in the lower court] is not properly before" this Court); E. Gressman et al., Supreme Court Practice § 6.31(i)(3), at 506 (9th ed. 2007) (presenting issues "not decided by the court below because they were not raised" is "ordinarily fatal to the petition"); Br. of U.S. Opp. Cert., *Arena* v. *United States*, 2000 WL 34014451, at *6 (U.S. Jun. 23, 2000) ("This Court should * * * decline to review an issue explicitly conceded below."). This Court is not a forum for do-overs, and it does not ordinarily permit "a petitioner to assert new substantive arguments attacking * * * the judgment when those arguments were not pressed in the court whose opinion [this Court is] reviewing." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001). DHS's central argument was squarely conceded below, and *certiorari* should be denied.

II. THE DECISION BELOW WAS CORRECT.

DHS concedes "the absence of a circuit conflict on the question presented," Pet. 24, and instead rests on the claim that *certiorari* is necessary to correct the error of the court below. But the Court of Appeals correctly interpreted the WPA when it held that MacLean's disclosure is not subject to the "specifically prohibited by law" exception to Section 2302(b)(8)(A). Its decision properly reflected the statute's plain text, structure, purpose, and legisla-

tive history. And it ensures that agencies—the very entities from which the WPA affords whistleblowers protection—cannot circumvent whistleblower protections merely by adopting regulations prohibiting disclosures.

Neither of DHS's contrary arguments holds water. Even if it were not waived, DHS's regulation-based argument is irreconcilable with the WPA. And the Agency's statute-based argument fails for an even simpler reason: The statute on which DHS relies does not itself prohibit *any* disclosures, let alone does it do so with sufficient specificity.

A. The WPA's "Specifically Prohibited By Law" Exception Does Not Encompass Regulations.

The WPA's "specifically prohibited by law" provision is unambiguous: It does not exempt disclosures barred only by regulation. That is perhaps most obvious from the marked distinction between that language and the broader phrase "law, rule, or regulation," which appears no fewer than seven times in Section 2302(b) alone. *See* 5 U.S.C. §§ 2302(b)(1)(E), (6), (8)(A)(i), (8)(B)(i), (9)(A), (12), (13). Indeed, the broader phrase occurs once as part of the *very same sentence* that contains the "specifically prohibited by law" exception: Section 2302(b)(8)(A) protects a disclosure of "any violation of *any law, rule, or regulation* * * * if such disclosure is not *specifically prohibited by law*." *Id.* § 2302(b)(8)(A) (emphases added).

"[W]here Congress includes particular language in one section of a statute but omits it in another * * * it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or

exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). Where the variation occurs within a single sentence, the inference of intentionality is even stronger. *See Corley* v. *United States*, 556 U.S. 303, 315 (2009) (inferring intentionality where Congress used the two terms in the same subsection). The repeated references to "law, rule, or regulation" establish that Congress knew how to cover regulations when it wanted to so. But instead, Congress chose to exclude them from the "specifically prohibited by law" exception.

That reading coheres with the WPA's broader structure. Section 2302(b)(8) establishes a class of protected conduct and enumerates a few limited exceptions. "[T]he explicit listing of exceptions," this Court has explained, "indicate[s] * * * that Congress did not intend courts to read other unmentioned * * * exceptions into the statute that it wrote." *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997); *see also Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980). That principle fits this statute to a "T." Congress exempted both disclosures "specifically prohibited by law" and information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. § 2302(b)(8)(A). The latter exception is particularly noteworthy: Inclusion of a limited category of Executive branch authority suggests intentional exclusion of the rest.

2. Section 2302(b)(8)(A) must be construed, moreover, to give effect to the WPA's central purpose: protecting government whistleblowers from the agencies that would retaliate against them. *Cf.*

Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) (emphasizing that a statute "should be interpreted so as to effect its purpose"). Whistleblower protection, at its core, is a check on federal agencies; it prevents them from taking actions they would otherwise be able to take. Naturally, agencies are not always happy to go along. (Were it otherwise, whistleblowers would hardly need protecting.) So it is entirely unsurprising that Congress enabled itself and the President to create exceptions to whistleblower protections through statutes and Executive orders but withheld that power from agencies themselves. Expanding the "specifically prohibited by law" exception to include regulations would undermine the entire enterprise by giving agencies the key to unlock the very restraints intended to bind them.

That is precisely why Congress changed the language in the first draft of the CSRA—"prohibited by law, rule, or regulation"—to the much narrower phrase "specifically prohibited by law." *Compare* H.R. 11280, *and* S. 2640, *with* 5 U.S.C. § 2302(b)(8)(A). "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello*, 464 U.S. at 23-24. That presumption, of course, applies equally to broadening language like the "rule or regulation" text omitted from the final version of the CSRA.

The drafting history of the CSRA is enough by itself to reject DHS' interpretation. And here, the import of the drafting change is only confirmed by other indicia of legislative intent. As the Senate Report explains:

> The committee narrowed the proviso for those disclosures not protected. There was concern that the limitation of protection in S. 2640 to those disclosures 'not prohibited by law, rule, or regulation,' would encourage the adoption of internal procedural regulations against disclosure, and thereby enable an agency to discourage an employee from coming forward with allegations of wrongdoing.

Senate Report at 19. Although DHS emphasizes that the word "statute" was removed from an early draft, the Conference Report confirms the meaning of the final language: "The reference to disclosures specifically prohibited by law is meant to refer to statutory law and court interpretations of those statutes. It does not refer to agency rules and regulations." Conference Report at 130.

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542 (1940). And here, Congress's intent could not have been clearer. In the context of Section 2302(b)(8)(A), "law" means statutes.

3. Against this text, structure, purpose, and legislative history, DHS offers up a single precedent that was not even on the books when the CSRA was enacted. In *Chrysler Corp.* v. *Brown*, this Court held that the phrase "authorized by law" in the Trade Secrets Act, 18 U.S.C. § 1905, includes authorizations by "properly promulgated, substantive agency regulations." 441 U.S. at 295. Because such regulations "have the force and effect of law," the Court reasoned, "[i]t would * * * take a clear showing of

contrary legislative intent" to read "authorized by law" to exclude them. *Id.* at 295-96 (internal quotation marks omitted). Finding nothing in the text of the Act or its legislative history "to support the respondents' suggestion that § 1905 does not address formal agency action," the Court adopted the broader reading of that statute. *Id.* at 298.

To be sure, the word "law" sometimes—perhaps even usually—encompasses regulations. No one disputes that proposition. But as *Chrysler Corp.* itself recognizes, the word "law" can also refer only to statutes. *See id.* at 296 (suggesting that "narrower" reading would be justified by a "clear showing of legislative intent"). And unlike the statute at issue in that case, this one bears all the hallmarks of that more limited meaning. Just as courts do not look to dictionaries to interpret statutorily defined terms, *see, e.g.*, *Ledbetter* v. *United States*, 170 U.S. 606, 611 (1898) ("If [C]ongress had not defined [a term] it would be proper to resort to a dictionary for a definition * * * ."), neither does ordinary meaning control when the text of a statute renders Congress's intention clear. *See, e.g.*, *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 95 (1935) (emphasizing that appeals to ordinary meaning have "force * * * if [a] statute ha[s] left the meaning of its terms to the test of popular understanding," not when the text is clear).

B. Section 114(r) Does Not "Specifically Prohibit" MacLean's Disclosure.

1. DHS argues in the alternative that MacLean's disclosure was "specifically prohibited by law" within the meaning of the WPA "[e]ven if the relevant inquiry were restricted to the four corners of the statute." Pet. 16. 49 U.S.C. § 114(r), it claims,

constitutes a "specific[ ] prohibit[ion]" of MacLean's disclosure. *See id.* at 16-22.

But Section 114(r)—which is substantially similar to an earlier statute, 49 U.S.C. § 40119(b)—does not actually prohibit *anything*, let alone does it do so "specifically." As the Court of Appeals recognized, the statute "does not expressly prohibit employee disclosures" at all; it "only empowers the Agency to prescribe regulations prohibiting disclosure." Pet. App. 13a. "Thus, the ultimate source of the prohibition of Mr. MacLean's disclosure is not a statute but a regulation." *Id.* In the absence of regulations, in other words, MacLean's disclosure would not have been prohibited in the first place.

But even if Section 114(r) could be read to constitute a prohibition (it cannot be), it does not approach the level of specificity the WPA requires. The WPA exempts only those disclosures that are "*specifically* prohibited by law." 5 U.S.C. § 2302(b)(8)(A) (emphasis added). "It is * * * a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). And when Congress said "specific[ ]" that is exactly what it meant. *See* Senate Report at 21 (suggesting that statutes "require[ ] that matters be withheld from the public * * * as to leave no discretion on the issue," "establish[ ] particular criteria for withholding," or "refer[ ] to particular types of matters to be withheld"). Although agencies can help *implement* bright-line prohibitions that Congress specifically defines, it cannot *supplement* them. Government employees should not have to guess whether disclosing information in the name

of public safety will cost them their jobs. That guesswork is eliminated when Congress sets specific, bright-line rules for employees to follow.

Section 114(r) does not come close to the specificity required. At best, it "provides only general criteria for withholding information." Pet. App. 14a. Regulations will prohibit disclosures, it states, "if the Under Secretary decides that disclosing the information would * * * be detrimental to the security of transportation." 49 U.S.C. § 114(r)(1). What kind of information is "detrimental to the security of transportation" if disclosed? The statute gives no answer. What criteria will TSA use to so "decide"? Again, silence. The provision is entirely subjective, setting no guideposts for the exercise of the Agency's discretion. It beggars belief to claim that that this language "specifically" prohibited MacLean's disclosure. After all, MacLean had good reason to believe that his disclosure was necessary to ensuring "the security of transportation," not "detrimental" to it. Certainly the members of Congress who responded to the news story thought so. And given that DHS rescinded its order after MacLean came forward, it must have thought so too.

Section 114(r)'s "insufficient specificity becomes even more apparent when it is contrasted with statutes that have been determined to fall under the WPA's 'specifically prohibited by law' proviso." Pet. App. 14a (distinguishing 18 U.S.C. § 1905 and 26 U.S.C. § 6013)). And a comparison to the SSI regulations is similarly illuminating. On the one hand, there is the statute's vague reference to information "detrimental to security of transportation." 49 U.S.C. § 114(r)(1). On the other, there is the regula-

tions' detailed rendering of the categories, subcategories, and sub-subcategories of information that qualify. *See* 49 C.F.R. § 1520.5(b). It is the difference between night and day, and exactly the distinction Congress intended to capture when it used the word "specifically." The regulations are specific, but reading "specifically prohibited by law" to cover the kind of general criteria enumerated in the statute would render the word "specifically" entirely superfluous.

2. DHS's contrary arguments are meritless. The Agency does not even try to defend the proposition that Section 114(r) itself prohibits any disclosures. It merely falls back on the regulations: "Section 114(r) 'prohibit[s]' the disclosure of * * * information," DHS reasons circularly, "by providing that the TSA 'shall prescribe regulations' to that effect." Pet. 17.

And on specificity, DHS simply declares that the Section 114(r) establishes "specific[ ]" categories of information to be disclosed. *See* Pet. 17. Its only response to the Court of Appeals' reasoned analysis is a complicated legislative-history argument that turns on a completely different statutory provision. After a decision by this Court interpreting FOIA's "specifically exempted from disclosure by statute" language broadly, *see FAA* v. *Robertson*, 422 U.S. 255 (1975) (quoting 5 U.S.C. § 552(b)(3) (1970)), Congress amended that provision to expressly apply only where a statute "leave[s] no discretion on the issue" or "establishes particular criteria for withholding." 5 U.S.C. § 552(b)(3) (1976). Because Section 2302(b)(8)(A) contains language similar to the pre-amendment version of FOIA, DHS reasons, Congress must have intended "specifically interpreted by law"

to be at least as broad as the Court's reading of FOIA in *Robertson*.

But whatever the value of legislative history in general may be, it is at its nadir when it relates to some other statute, particularly when the text (and, yes, even the legislative history) of the relevant statute is clear. There is no need to look to FOIA's drafting history in an effort to read Congress's mind about Section 2302(b)(8)(A). And in any event, there is no dispute that SSI is exempt from disclosure under FOIA. Section 114(r), after all, expressly exempts SSI from FOIA's coverage. *See* 49 U.S.C. § 114(r)(1) (providing for the issuance of SSI regulations "[n]otwithstanding section 552 of title 5"—*a.k.a.*, FOIA). That it contains no such exemption from the WPA is merely another reason to believe that Congress did not intend to create one.[1]

III. THIS COURT'S REVIEW IS UNWARRANTED.

DHS offers no compelling justification for granting *certiorari*. It does not attempt to identify a split of

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[1] The Court of Appeals' interpretation of the WPA was the correct one. But even if this Court were to disagree, there are alternative grounds for affirmance that militate against granting *certiorari*. In particular, even if the WPA does not apply, MacLean's removal was still improper because (1) it constituted retroactive decisionmaking that violated fundamental tenets of due process as well as the *Chenery* doctrine; (2) it violated the CSRA's prohibition against discrimination on the basis of non-performance related conduct, *see* 5 U.S.C. § 2302(b)(10); (3) it constituted retaliation on the basis of speech in violation of the First Amendment; and (4) removal was an inappropriate penalty. The Court of Appeals rejected some of these arguments, but they constitute alternative grounds for affirming its judgment.

authority, and there is not even a divergence of opinion—all three panelists reached the same conclusion, and no judge dissented from denial of rehearing *en banc*. In the absence of any conflict, DHS contends that the Court must intervene in the name of public safety. But the scope of the Court of Appeals' decision is overblown and the supposed tension between protecting whistleblowers and protecting the public is contrived. As Congress has long recognized, protecting whistleblowers promotes, rather than threatens, public safety.

1. DHS acknowledges the absence of any split among lower courts on the question presented. Pet. at 24. But this should not stop the Court from weighing in, DHS contends, because the Federal Circuit exercises "outsized influence" on this area of law. *Id.* To be sure, this Court's review of Federal Circuit decisions is sometimes justified even in the absence of a circuit split where the lower court (1) has exclusive jurisdiction and (2) is itself divided on the issue. *See* E. Gressman *et al.*, *Supreme Court Practice* § 4.21, at 286-88 (9th ed. 2007).

But for one thing, a provision of the WPEA makes Section 2302(b)(8) cases appealable to "any court of appeals of competent jurisdiction" through the end of 2014. 5 U.S.C. § 7703(b)(1)(B). And as DHS recognizes, the MSPB does not consider itself bound by Federal Circuit precedents in these cases. *See* Pet. at 25 (citing *Day* v. *DHS*, 119 M.S.P.R. 589, 595 n.5 (2013)). For another, the kind of intra-circuit disagreement that can sometimes warrant *certiorari* is entirely absent. *Cf., e.g., Warner-Jenkinson Co., Inc.* v. *Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997) (granting *certiorari* to resolve a "significant disa-

greement" within the Federal Circuit, which had had split 7-5); *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 727 (2002) (granting *certiorari* when the Federal Circuit's "holding departed from its own cases"). *Not one* Article III judge has adopted the view of Section 2302(b)(8)(A) DHS now advances. The decision below was unanimous, and DHS's petition for *en banc* review was denied without dissent. *See* Pet. App. 165a-66a. Even at the administrative level, DHS points to no prior decisions that came out differently. There are none.

2. Without a divergence of authority—or even of opinion—to rely on, DHS attempts to justify *certiorari* by conjuring up a parade of horribles it claims will result from the lower court's decision. Interpreting the WPA as it was written, DHS claims, will endanger the public and "erode the SSI scheme's deterrent effect." Pet. at 24.

These fears are unfounded. Section 2302(b)(8)(A) has protected government whistleblowers since 1978, *see* CSRA, Pub L. 95-454, 92 Stat. 1111, and regulations prohibiting the disclosure of air-safety information are even older than that, *see* 14 C.F.R. Pt. 191 (1976). In the more than thirty-five years that these regimes have coexisted, the sky has not fallen. Indeed, DHS does not point to a single other instance where they have come into conflict. Moreover, it acknowledges that there seems to be no such case on the horizon. *See* Pet. 25 ("[T]he government is unaware of any case involving the question presented that is on track to be decided before [the end of 2014].").

More broadly—and contrary to the picture DHS would paint—SSI-disclosure regulations and whistleblower-protection laws do not work at cross-purposes. Far from pitting public safety against employee protection, *both* regimes play crucial and complimentary roles in protecting the public. SSI rules do it by prohibiting disclosures that create danger; the WPA does it by encouraging disclosures that prevent danger.

And in most cases, of course, the WPA does not protect employees who disclose sensitive information. The WPA applies *only* when an employee reasonably believes that the disclosed information reveals unlawful, grossly wasteful, abusive, or substantially dangerous activity; *only* when the information is disclosed to an appropriate person; and *only* when an employee is removed for that reason. *See* 5 U.S.C. § 2302(b)(8)(A). In this limited circumstance—and this circumstance only—Congress has determined that the benefits of disclosure outweigh its risks. And in retrospect, MacLean's actions demonstrate that Congress calculated correctly: If he had remained silent, DHS's "mistake" would have gone uncorrected, and terrorist organizations would have had the skies to themselves for a potentially devastating attack.

The decision below thus applies to an exceedingly narrow category of disclosures. Indeed, it is not yet clear that the WPA applies even *in this case*. The Board has not yet had occasion to resolve that issue. And the Court of Appeals held only that SSI disclosures are not categorically exempt from WPA coverage; it did not decide whether MacLean actually qualifies for whistleblower protection. As the deci-

sion below recognizes, MacLean will not be eligible for whistleblower protection unless he can demonstrate on remand that all of the Act's requirements are fully satisfied. *See* Pet. App. 17a. If he fails to do so, the WPA will not protect him—just as it will not bear on most SSI disclosures.[2]

3. At the end of the day, DHS's attempt to elevate its SSI regulations over the WPA is unsurprising. Indeed, it is exactly what Congress foresaw when it enacted and repeatedly strengthened Section 2302(b)(8)(A). The truth is that federal agencies are not likely to thank employees who step forward to expose unlawful or improper government conduct. If it were otherwise, whistleblowers would not need protecting and Robert MacLean would still be at work. But agencies have strong incentives to "conceal wrongdoing," and employees like MacLean who "summon[ ] the courage to disclose the truth" are often rewarded with "severe damage to their careers and substantial economic loss." Senate Report at 8. That is exactly why whistleblower protection is so crucial to "keeping our government honest and efficient." S. Rep. No. 112-155, at 1-2. And that is exactly why Congress narrowed the exemption from disclosures specifically "prohibited by law, rule, or

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[2] The remand both demonstrates the narrowness of the Court of Appeals' ruling and suggests yet another reason *certiorari* should be denied: The decision below is not a final resolution of this case. *Cf., e.g., Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) (denying *certiorari* "because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this Court").

regulation" to disclosures "specifically prohibited by law." *See* Senate Report at 21. Congress knew that agencies would try to circumvent whistleblower protections through regulation—just as DHS seeks to do now.

Of course, if Congress wants to exempt SSI disclosures from whistleblower protections, it can certainly do so. Indeed, the President, by way of Executive order, may well be able to do so too. *See* 5 U.S.C. § 2302(b)(8)(A) (exempting disclosures of information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs"). But far from prohibiting the disclosure of SSI, the President has issued an Executive Order affirmatively stating that "[t]he mere fact that information is designated as [Controlled Unclassified Information]"—a category that includes SSI, as well as other kinds of unclassified but protected information—"shall *not* have a bearing on determinations pursuant to any law requiring the disclosure of information or permitting disclosure as a matter of discretion." Exec. Order No. 13,556 § 2(b), 75 Fed. Reg. 68,675 (Nov. 4, 2010) (emphasis added). And the text, structure, purpose, and legislative history of Section 2302(b)(8)(A) make clear that in enacting whistleblower-protection laws Congress intended exactly the result the Court of Appeals reached.

Congress reaffirmed that intent as recently as 2012 when it enacted the WPEA. With that Act, Congress confirmed that whistleblower protection extends into the TSA generally and air-security issues specifically. *See* WPEA, 126 Stat. at 1470 ("Notwithstanding any other provision of law, any individual holding

* * * a position within the Transportation Security Administration shall be covered by * * * the provisions of section 2302(b) (1), (8), and (9)."); S. Rep. No. 112-155, at 1 (emphasizing that whistleblower protection must extend to "those with knowledge of problems at our nation's airports"). "[I]n a post-9/11 world," Congress has recognized, "we must do our utmost to ensure that those with knowledge of problems at our nation's airports, borders, [and] law enforcement agencies * * * are able to reveal those problems without fear of retaliation or harassment." *Id.* MacLean knew of a problem, revealed it, and was retaliated against. Congress has made clear that this is precisely the evil whistleblower-protection laws are intended to prevent.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

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March 2014

REPLY BRIEF

No. 13-894

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, PETITIONER

v.

ROBERT J. MACLEAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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The Federal Circuit recognized that respondent's public disclosure of particular passenger flights that would not be protected by federal air marshals "compromised flight safety," was a "threat to public safety" and "could have had catastrophic consequences." Pet. App. 8a. The Federal Circuit also recognized that Congress has mandated the promulgation of regulations that prohibit disclosures deemed "detrimental" to transportation security, *id.* at 11a (citation omitted); see 49 U.S.C. 114(r)(1)(C); that regulations implementing that congressional mandate expressly designated information about federal-air-marshal deployments as "Sensitive Security Information" (SSI) Pet. App. 6a, see 49 C.F.R. 1520.7(j) (2002); and that respondent's disclosure of such deployment information was accordingly unlawful, Pet. App. 5a-7a. The Federal Circuit nevertheless held that respond-

ent's disclosure was not "specifically prohibited by law." 5 U.S.C. 2302(b)(8)(A); see Pet. App. 10a-17a. Under that holding, neither respondent nor any other federal employee can be disciplined for publicly exposing vulnerabilities in transportation security, so long as the disclosure was motivated by "reasonabl[e]" (but not necessarily meritorious) disagreement with the government's decision to give higher priority to other security concerns. 5 U.S.C. 2302(b)(8)(A).

The Federal Circuit's decision is wrong, dangerous, and warrants this Court's immediate review. Although respondent characterizes the decision as "exceedingly narrow," Br. in Opp. 30, the decision will, if left undisturbed, embolden further disclosures of SSI and could put lives at risk. Respondent's merits argument largely repeats the Federal Circuit's errors, giving short shrift to Congress's express intent both to prohibit disclosure of SSI and to handle grievances about confidential matters through confidential channels. This case is a suitable—and, likely, the only foreseeable—vehicle for correcting the Federal Circuit's serious legal mistake and avoiding the potentially serious consequences. This Court should accordingly grant certiorari and reverse.

A. The Question Presented Is Exceptionally Important

As the petition explains (Pet. 22-26), this case presents a question of exceptional importance that this Court should promptly resolve. Respondent's suggestion (Br. in Opp. 30) that the decision below addresses only "an exceedingly narrow category of disclosures" fundamentally misunderstands the decision and the legal framework within which it operates. Under the Federal Circuit's interpretation of Section 2302(b)(8)(A), a federal employee will be immunized from *any* "per-

sonnel action" (not just "remov[al]," Br. in Opp. 30) in response to "*any* disclosure" of SSI (not just disclosures "to an appropriate person," *ibid.*), so long as the employee "*reasonably believes*" that the disclosure "evidences," for example, "a substantial and specific danger to public health or safety." 5 U.S.C. 2302(b)(8)(A) (emphasis added). For reasons explained in the petition (at 23-24), even that last requirement is no real "limit[]" (Br. in Opp. 30) in the context of SSI, because SSI by its nature involves public-safety matters; its content frequently reflects difficult choices about how best to allocate finite security resources; those difficult choices will often be subject to plausible objections; and employees will thus frequently have a basis for claiming to "reasonably believe[]" that disclosing SSI will be beneficial.

This Court, rather than the Federal Circuit, should decide the important question whether Congress has in fact invited federal employees to unilaterally expose security vulnerabilities publicly whenever their employing agency has allocated finite security resources in a manner different from what an individual employee might reasonably have preferred. Respondent asserts (Br. in Opp. 29) that because "the sky has not fallen" in the past, any suggestion that an employee will make dangerous disclosures in the future is "unfounded." But prior to the Federal Circuit's decision in this case, the SSI regulations were apparently understood to mean what they say and to prohibit disclosures that would "be detrimental to the security of transportation." 49 U.S.C. 114(r)(1)(C). Employees who had concerns about agency action involving SSI could raise those concerns to the Inspector General or the Special Counsel pursuant to 5 U.S.C. 2302(b)(8)(B),

thereby furthering *both* an interest in oversight of government operations *and* the interest in protecting sensitive security information. See Pet. 21-22. Now, however, employees have a green light to disregard the latter interest completely.*

Respondent's suggestion (Br. in Opp. 28-29), that the petition be denied due to the absence of a circuit conflict is misconceived. As the petition explains (at 24-26), no circuit conflict is likely to develop. The statutory provision giving courts outside the Federal Circuit jurisdiction over these sorts of cases will expire at the end of this year, Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, Tit. I, § 108, 126 Stat. 1469-1470; no cases are on track to be decided in that timeframe, Pet. 25; and even before the time window expires, employees can, and presumably would, appeal their cases to the Federal Circuit, *ibid.* Furthermore, as the petition additionally explains (at 25-26), and respondent nowhere refutes, another vehicle is unlikely to arise in *any* court, because in light of the Federal Circuit's decision, a federal supervisor would risk serious *personal* sanctions (including termination) if he ever disciplined an employee in circumstances that could lead to judicial review of the question presented here. Even this case itself may not provide another opportunity for

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* Another reason why the past is no predictor of the future is that Transportation Security Officers, who make up about 80% of the TSA's workforce, received statutory protection under Section 2302(b)(8) only in November 2012. See Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, Tit. I, § 109, 126 Stat. 1470. And it would take only one of the agency's roughly 60,000 employees to make a disclosure that could cause serious and irreparable harm.

the Court to address the question presented, depending on how the further proceedings contemplated by the Federal Circuit's decision unfold. See Br. in Opp. 30-31 & n.2. In any event, even if some future opportunity for review in this Court were assured, the continuing potential for a harmful disclosure in the interim and the inadequacy of later reversal of the Federal Circuit's decision to undo the consequences of such a disclosure counsel strongly in favor of immediate review.

B. The Federal Circuit's Decision Is Incorrect

On the merits, respondent cannot meaningfully dispute that (as two circuit courts have recognized) his disclosure of information about federal-air-marshal deployments was legally prohibited under the nondisclosure regime mandated by Congress. See Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101(e), 115 Stat. 603 (49 U.S.C. 40119); Homeland Security Act of 2002, Pub. L. No. 107-296, Tit. XVI, § 1601(b), 116 Stat. 2312; 67 Fed. Reg. 8351 (Fed. 22, 2002); 49 C.F.R. 1520.7(j) (2002); Pet. App. 5a-9a; Pet. 2-7; see *MacLean* v. *Department of Homeland Sec.*, 543 F.3d 1145, 1149-1150 (9th Cir. 2008) (per curiam) (upholding TSA's determination that the disclosed information was SSI). The question in this case is whether that legal prohibition rendered respondent's disclosure "specifically prohibited by law" for purposes of Section 2302(b)(8)(A). For reasons explained in the petition (at 12-22), it did.

1. Respondent's contrary argument largely disregards the evident limits on the circumstances in which Congress wanted to encourage government employees to go to the media or other members of the public with reports of perceived government missteps. In enact-

ing Section 2302(b)(8), Congress balanced the utility of disclosures with the potential harm of exposing sensitive information to public view. Pet. 20-22. It crafted a scheme that encourages public disclosure of nonsensitive information that provides particular cause for concern, 5 U.S.C. 2302(b)(8)(A), but maintains the confidentiality of sensitive information by requiring employees to raise any concerns involving such information through established intragovernmental channels, 5 U.S.C. 2302(b)(8)(B). Respondent's focus (Br. in Opp. 20) on the asserted "central purpose" of Section 2302(b)(8) to encourage public reporting by government employees disregards the principle that "[n]o legislation pursues its purposes at all costs." *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990) (citation omitted). "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Ibid.* (citation omitted).

Respondent, and the Federal Circuit, would frustrate Congress's intent in precisely that way by reading the phrase "by law" so narrowly as to exclude nondisclosure regulations enacted pursuant to an express congressional directive that such regulations "shall" be prescribed. Respondent correctly acknowledges (Br. in Opp. 22-23) that, as this Court recognized in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), a "clear showing of * * * legislative intent" is required to overcome the presumption that the term "by law" includes "properly promulgated, substantive

agency regulations." *Id.* at 295-296. Contrary to respondent's suggestion (Br. in Opp. 19-23), Congress's separate use of the phrase "*any violation of any* law, rule, or regulation," 5 U.S.C. 2302(b)(8)(A) (emphasis added), does not clearly show that it intended to depart from the "traditional understanding," *Chrysler Corp.*, 441 U.S. at 296, of the syntactically different phrase "*by* law," 5 U.S.C. 2302(b)(8)(A) (emphasis added). And even assuming that Congress intended the phrase "by law" to have an atypically narrow scope that would exclude *some* regulations, nothing in the text or legislative history of Section 2302(b)(8)(A) shows an intent by Congress to exclude nondisclosure regulations that Congress *itself* directly instructed an agency to promulgate. The legislative history of Section 2302(b)(8)(A) reflects a concern that agencies not circumvent that provision by promulgating "*internal procedural* regulations" that would prohibit disclosure of potentially embarrassing information. S. Rep. No. 969, 95th Cong., 2d Sess. 21 (1978) (Senate Report) (emphasis added); see Pet. 15. It contains no indication of any concern about agencies' promulgating regulations that prohibit disclosure of sensitive security information when Congress has expressly directed the agency to do so.

2. Even assuming the term "law" excludes the SSI regulations, 49 U.S.C. 114(r) itself "specifically prohibit[s]" respondent's disclosure. That statute imposes upon the TSA a mandatory duty, providing that TSA "shall prescribe regulations prohibiting" the "disclosure of information obtained or developed" in carrying out certain transportation-security functions, if the agency "decides" that "disclosing the information would (A) be an unwarranted invasion of per-

sonal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) be detrimental to the security of transportation." 49 U.S.C. 114(r)(1). Respondent, like the court of appeals, takes the view (Br. in Opp. 23-27) that Section 114(r) vests too much discretion in the agency to itself be construed as "specifically prohibit[ing]" the disclosure of SSI. For two independent reasons, that view is incorrect.

First, as the petition explains (at 17-18), when Congress enacted Section 2302(b)(8)(A)'s "specifically prohibited by law" proviso, Congress was aware of the broad construction this Court had given to a similar phrase, "specifically exempted from disclosure by statute." In particular, this Court had construed information to be "specifically exempted from disclosure by statute" even when a statute merely vested an agency with discretion to decide whether the information should be kept confidential. See *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975). Congress nevertheless decided to include the even broader phrase "specifically prohibited by law" in Section 2302(b)(8)(A), strongly indicating that a statute like Section 114(r) would be covered, even if it relies on the TSA's expertise to implement the details of the SSI nondisclosure scheme. Contrary to respondent's characterization (Br. in Opp. 26-27), this point is neither "complicated" nor a "legislative-history argument that turns on a completely different statutory provision." It is, instead, a straightforward application of the cardinal principle that Congress is presumed to incorporate preexisting interpretations of statutory language that it adopts. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006).

Second, Section 114(r) would still be covered even on respondent's much more cramped reading of the "specifically prohibited by law" proviso. Citing a Senate Report accompanying a version of Section 2302(b)(8) that Congress did *not* adopt, Pet. 19, respondent suggests that the proviso applies only to a statute that "'requires that matters be withheld from the public in such a manner as to leave no discretion of the issue,' 'establishes particular criteria for withholding,' *or* 'refers to particular types of matters to be withheld.'" Senate Report 21 (emphasis added) (quoted in Br. in Opp. 24). Those are the same conditions under which a statute "specifically exempt[s]" information "from disclosure" for purposes of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3). This Court has recognized that a statute similar to Section 114(r)—namely, Section 102(d)(3) of the National Security Act of 1947, which stated that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure," 50 U.S.C. 403(d)(3) (1976)—satisfies the "specifically exempted from disclosure by statute" proviso in FOIA. *CIA* v. *Sims*, 471 U.S. 159, 167-168 (1985). And the Senate Report on which respondent relies expressly anticipated that Section 102(d)(3) would also satisfy the Senate's proposed version of Section 2302(b)(8)(A)'s proviso. Senate Report 21-22.

Respondent does not even address the comparison to Section 102(d)(3), let alone offer a sound interpretation of the "specifically prohibited by law" proviso that would include Section 102(d)(3) while excluding Section 114(r). Respondent briefly suggests (Br. in Opp. 27) that Section 114(r) should be treated differently under the FOIA proviso than under the Section

2302(b)(8)(A) proviso, because Section 114(r)'s preamble expressly mentions FOIA but not Section 2302(b)(8)(A). That suggestion is unsound. As respondent himself appears to recognize (*id.* at 6-8, 30), Section 114(r)'s preamble, which clarifies that the TSA shall promulgate nondisclosure regulations "[n]otwithstanding section 552 of title 5," does not limit the effect of those regulations to the context of FOIA requests, but instead is consistent with the promulgation of regulations that prohibit unauthorized disclosures more generally. See Pet. App. 5a-9a; Pet. 2-7; *MacLean*, 543 F.3d at 1149-1150. And nothing would suggest that a nondisclosure statute must expressly mention Section 2302(b)(8)(A) in order to qualify as "law" for purposes of that provision's "specifically prohibited by law" proviso.

3. Respondent errs in contending (Br. in Opp. 14-18) that the government has waived its argument that regulations enacted pursuant to Section 114(r) constitute "law" for purposes of the Section 2302(b)(8)(A) proviso. As a threshold matter, respondent is wrong to the extent he suggests that waiver concerns should lead this Court to deny certiorari even if the decision below decided an exceptionally important national-security issue incorrectly. Any asserted deficiencies in the government's presentation below neither prejudiced respondent's own ability to present his view of the statute nor affected the court of appeals' decision, which expressly accepted that "[r]egulations promulgated pursuant to Congress's express instructions would qualify as specific legal prohibitions." Pet. App. 15a. This Court can and does grant certiorari to review questions "pressed *or* passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (emphasis

added), and it also generally permits a petitioner to raise new arguments in support of an issue that was litigated in the lower court, see *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992). It would, moreover, be particularly inadvisable to deny further review in this case on the basis of respondent's asserted waiver concerns when it is unclear when, how, or whether the Court will again have the opportunity to resolve the extraordinarily important question that this case presents. See pp. 4-5, *supra*.

In any event, although the statements highlighted by respondent illustrate that the government could have been clearer in its presentation to the Federal Circuit, they fall short of showing waiver. As the petition acknowledged (at 15-16), the government's argument in the court of appeals focused primarily on the contention that the statute itself is the relevant "law" for Section 2302(b)(8)(A) purposes. But the government also argued that "when an agency has adopted non-disclosure regulations pursuant to a specific Congressional mandate to do so, the agency may discipline the employee who violates that non-disclosure regulation." Gov't C.A. Br. 48; see Pet. 16 (citing similar statements in the government's brief). And oral argument in the Federal Circuit included the following exchange:

> COURT: Is it the government's position that "specifically prohibited by law" includes rules and regulations?
>
> GOVERNMENT ATTORNEY: Generally, no.
>
> COURT: So what is the dividing line? What is it, certain types of rules and regulations but not others?

> GOVERNMENT ATTORNEY: *It's only rules and regulations if a statute says that an agency has to pass that rule or regulation.* So the "specifically prohibited by law" is statute, really, it's saying specifically prohibited by a statute that's saying nondisclosure.

Oral Argument at 25:17 to 25:49, 714 F.3d 1301 (No. 2011-3231) (emphasis added).

The government is making that same argument now. See Pet. 12-16, pp. 5-7, *supra*. The government's position is, and has always been, that a scheme in which Congress directs an agency to promulgate nondisclosure regulations constitutes "law" for purposes of the Section 2302(b)(8)(A) proviso. The argument that the regulations are the relevant "law" because the statute mandates them and the argument that the statute is the relevant "law" because it directs the promulgation of the regulations are simply flip sides of the same coin. There is no sound reason why the Court cannot consider in this case both of those arguments--each of which shows that the Federal Circuit made a serious error on a question of exceptional importance.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

APRIL 2014

JOINT APPENDIX

RECORD
AND
BRIEFS

No. 13-894

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PETITION FOR A WRIT OF CERTIORARI FILED: JAN. 27, 2014
CERTIORARI GRANTED: MAY 19, 2014

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Docket No. 11-3231

ROBERT MACLEAN, PETITIONER

v.

DEPARTMENT OF HOMELAND SECURITY, RESPONDENT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
9/23/11	1	Appeal docketed. Received: 09/22/2011. [58612]
10/19/11	2	Entry of appearance for Lawrence A. Berger as principal counsel for Petitioner Robert J. MacLean. Service: 10/14/2011 by US mail. [58616]
10/19/11	3	Statement Concerning Discrimination pursuant to Fed. Cir. R. 15(c) for Petitioner Robert J. MacLean. Service: 10/14/2011 by US mail. [58621]
10/19/11	4	Certificate of Interest for the Petitioner Robert J. MacLean. Service: 10/14/2011 by US mail. [58629]
10/25/11	5	Entry of appearance for Michael Goodman as principal counsel for Respondent DHS. Service: 10/25/2011 by US mail. [58630]

DATE	DOCKET NUMBER	PROCEEDINGS
10/27/11	9	Docketing Statement for the Respondent DHS. Service: 10/27/2011 by US mail. [58645]
10/28/11	6	ORDER dismissing appeal for failure to prosecute in accordance with the rules; (No fee). Service: 10/28/2011 by clerk. [58638]
10/28/11	7	Mandate issued to the Merit Systems Protection Board. Service: 10/28/2011 by clerk. [58641]
10/31/11	8	Docketing Statement for the Petitioner Robert J. MacLean. Service: 10/31/2011 by US mail. [58644]
10/31/11	10	ORDER reopening appeal. Service: 10/31/2011 by clerk. [58648]
11/8/11	16	Certified list from the Merit Systems Protection Board. Service: 11/08/2012 by US mail.. [58712]
1/5/12	11	MOTION of Petitioner Robert J. MacLean to extend the time to file the appellant/petitioner's principal brief. Service: 01/05/2012 by US mail. [58653]
1/9/12	12	ORDER granting motion to extend time to file appellant/petitioner principal brief [11] filed by Petitioner Robert J. MacLean.. Service: 01/09/2012 by clerk. [58654]

DATE	DOCKET NUMBER	PROCEEDINGS
2/7/12	13	MOTION of Petitioner Robert J. MacLean to extend the time to file the appellant/petitioner's principal brief. [Consent: not addressed]. Service: 01/03/2012 by fax. [58696]
2/8/12	14	ORDER granting motion to extend time to file appellant/petitioner principal brief [13] filed by Petitioner Robert J. MacLean.. Service: 02/08/2012 by clerk. [58697]—[Edited 03/18/2013 by AT]
3/9/12	15	Entry of appearance for Thomas Devine as of counsel for Petitioner Robert J. MacLean. Service: 03/09/2012 by US mail. [58699]
3/9/12	17	TENDERED from Petitioner Robert J. MacLean. Title: Brief of Petitioner. [58731] This brief has been replaced. See Doc. No. [57]
3/9/12	18	BRIEF FILED for Petitioner Robert J. MacLean [17]. Title: Brief of Petitioner, [Non-Confidential version only]. Number of Pages: 0. Service: 03/09/2012 by US mail.. [58749] This brief has been replaced. See Doc. No. [57]
3/19/12	19	MOTION of Joseph P. Carson for leave to file an amicus curiae brief. [Consent: not addressed]. Service: 03/16/2012 by US mail. [58774]

DATE	DOCKET NUMBER	PROCEEDINGS
3/19/12	34	TENDERED from Amicus Curiae Joseph P. Carson. Title: Brief of Amicus in Support of Mr. McLean Supporting Mitigation of Removal Penalty. [58834]
3/19/12	20	MOTION of Elijah E. Cummings, Dennis J. Kucinich, Carolyn B. Maloney for leave to file an amicus curiae brief. [Consent: unopposed]. Service: 03/19/2012 by US mail. [58779]—[Edited 03/18/2013 by AT]—[Edited 03/19/2013 by AT]—[Edited 03/19/2013 by AT]
3/19/12	40	TENDERED from Amici Curiae Elijah E. Cummings, Dennis J. Kucinich, Carolyn B. Maloney. Title: Brief for Amici Curiae Supporting Reversal. [59407]—[Edited 03/18/2013 by AT]—[Edited 03/19/2013 by AT]
3/23/12	21	RESPONSE of Respondent DHS to the motion for leave to file an amicus curiae brief [19]. Service: 03/23/2012 by US mail. [58786]
4/3/12	22	MOTION of Respondent DHS to extend the time to file the appellee/respondent/cross-appellant's principal brief. [Consent: unopposed]. Service: 04/03/2012 by US mail. [58791]

DATE	DOCKET NUMBER	PROCEEDINGS
4/3/12	23	REPLY of Amicus Curiae Joseph P. Carson to response filed by Respondent in 11-3231, Doc. No [21]. Service: 04/02/2012 by US mail. [58793]—[Edited 03/18/2013 by AT]
4/11/12	24	ORDER granting motion to extend time to file appellee/respondent/cross-appellant principal brief [22] filed by Respondent DHS.. brief is due by May 23, 2012. Service: 04/11/2012 by clerk. [58798]
5/22/12	25	MOTION of Respondent DHS to extend the time to file the appellee/respondent/cross-appellant's principal brief. [Consent: unopposed]. Service: 05/22/2012 by US mail. [58809]
5/29/12	26	ORDER granting motion to extend time to file appellee/respondent/cross-appellant principal brief [25] filed by Respondent DHS.. brief due by May 30, 2012. Service: 05/29/2012 by clerk. [58810]
5/30/12	32	TENDERED from Respondent DHS. Title: Brief and Supplemental Appendix for Respondent Department of Homeland Security. [58831]
5/30/12	33	BRIEF FILED for Respondent DHS [32]. Title: Brief and Supplemental Appendix for Respondent De-

DATE	DOCKET NUMBER	PROCEEDINGS
		partment of Homeland Security, [Non-Confidential version only]. Number of Pages: 50. Service: 05/30/2012 by US mail. ECF-10, filer [58832]
5/31/12	27	ORDER filed granting motion for leave to file an amicus curiae brief [19]. By: Judge. Service: 05/31/2012 by clerk. [58813]—[Edited 03/19/2013 by AT]
5/31/12	28	ORDER filed granting motion for leave to file an amicus curiae brief [20]. By: Judge. Service: 05/31/2012 by clerk. [58821]—[Edited 03/19/2013 by AT]
5/31/12	29	Entry of appearance for David Nolan as principal counsel for Amicus Curiae Joseph P. Carson. Service: 03/16/2012 by US mail. [58822]
5/31/12	30	Certificate of Interest for the Amicus Curiae Joseph P. Carson. Service: 03/16/2012 by US mail. [58827]
5/31/12	31	Certificate of Interest for the Amici Curiae Elijah E. Cummings, Dennis J. Kucinich and Carolyn Maloney. Service: 03/16/2012 by US mail. [58828]
5/31/12	35	BRIEF FILED (AMICUS) for Joseph P. Carson [34]. Title: Brief of Amicus in Support of Mr. McLean

DATE	DOCKET NUMBER	PROCEEDINGS
		Supporting Mitigation of Removal Penalty, [Non-Confidential version only]. Number of Pages: 10. Service: 03/16/2012 by US mail.. [58835]
5/31/12	41	BRIEF FILED (AMICUS) for Elijah E. Cummings, Dennis J. Kucinich and Carolyn Maloney [40]. Title: Brief for Amici Curiae Supporting Reversal, [Non-Confidential version only]. Number of Pages: 20. Service: 03/19/2012 by US mail. [59416]—[Edited 03/18/2013 by AT]
6/12/12	37	MOTION of Petitioner Robert J. MacLean to extend the time to file the reply brief. [Consent: not addressed]. Service: 06/12/2012 by US mail. [59386]
6/15/12	38	ORDER granting motion to extend time to file reply brief [37] filed by Petitioner Robert J. MacLean.. brief is due by July 13, 2012. Service: 06/15/2012 by clerk. [59387]
6/18/12	39	Entry of appearance for F.Douglas Hartnett as of counsel for Amici Curiae Elijah E. Cummings, Dennis J. Kucinich and Carolyn Maloney. Service: 06/12/2012 by US mail. [59398]

DATE	DOCKET NUMBER	PROCEEDINGS
7/13/12	42	TENDERED from Petitioner Robert J. MacLean. Title: Reply Brief of Petitioner. [59427] This brief has been replaced. See Doc. No. [57]
7/13/12	43	BRIEF FILED for Petitioner Robert J. MacLean [42]. Title: Reply Brief of Petitioner, [Non-Confidential version only]. Number of Pages: 0. Service: 07/13/2012 by US mail. [59432] This brief has been replaced. See Doc. No. [57]
7/27/12	44	MOTION of Petitioner Robert J. MacLean to extend the time to file the appendix. [Consent: not addressed]. Service: 07/27/2012 by US mail. [59433]
7/27/12	46	TENDERED from Petitioner Robert J. MacLean. Title: Appendix. [59437] This appendix has been rejected. See Doc. No. 54.—[Edited 03/19/2013 by AT]—[Edited 03/19/2013 by AT]
7/27/12	48	The appendix submitted by Petitioner Robert J. MacLean [46] cannot be filed at this time and is placed on the pending shelf; reason: motion pending. [59440]—[Edited 03/19/2013 by AT]

DATE	DOCKET NUMBER	PROCEEDINGS
7/30/12	45	MOTION of Petitioner Robert J. MacLean to file a corrected Opening and Reply Briefs brief. Service: 07/27/2012 by US mail. [59436]
7/30/12	51	TENDERED from Petitioner Robert J. MacLean. Title: Corrected Brief of Petitioner. [59458]
7/30/12	47	TENDERED from Petitioner Robert J. MacLean. Title: Corrected Reply Brief of Petitioner. [59439]
8/14/12	49	ORDER granting motion to extend time to file appendix [44] filed by Petitioner Robert J. MacLean.. Service: 08/14/2012 by clerk. [59454]
8/14/12	50	ORDER granting motion to file a corrected brief [45] filed by Petitioner Robert J. MacLean. Service: 08/14/2012 by clerk. [59456]
8/14/12	52	BRIEF FILED for Petitioner Robert J. MacLean [51]. Title: Corrected Brief of Petitioner, [Non-Confidential version only]. Number of Pages: 62. Service: 07/27/2012 by US mail. [59461]
8/14/12	53	BRIEF FILED for Petitioner Robert J. MacLean [47]. Title: Corrected Reply Brief of Petitioner [Non-Confidential version only]. Number of Pages: 32. Service:

DATE	DOCKET NUMBER	PROCEEDINGS
		07/27/2012 by US mail. [59462]—[Edited 03/19/2013 by AT]
8/14/12	57	Pursuant to the court's order and the filing of corrected briefs, the previously filed briefs of Petitioner Robert J. MacLean in 11-3231 [43], [42], [18], [17] are withdrawn. [59749]
8/15/12	54	NOTICE OF REJECTION: The brief of Petitioner Robert J. MacLean, Appendix [46], is not in compliance with the rules of this court and is therefore rejected for filing. [59463]—[Edited 03/19/2013 by AT]
10/3/12	55	TENDERED from Petitioner Robert J. MacLean. Title: Corrected Appendix. [59467]—[Edited 03/19/2013 by AT]
10/3/12	56	APPENDIX FILED for Robert J. MacLean [55]. Title: Corrected Appendix, [Non-Confidential version only]. Number of Pages: 311. Service: 10/02/2012 by US mail. [59468]—[Edited 03/19/2013 by AT]
11/21/12	36	NOTICE OF CALENDARING issued. Panel: 1301E. Calendar date/location: Wednesday, 01/09/2013 Washington, D.C. Courtroom 201. [58865]—[Edited 03/19/2013 by AT]

DATE	DOCKET NUMBER	PROCEEDINGS
12/3/12	58	Response to oral argument order from the Respondent DHS designating Michael Goodman as arguing attorney. Service: 12/03/2012 by US mail. [59763]
12/17/12	59	MOTION of Respondent DHS to unseal case. [Consent: unopposed]. Service: 12/17/2012 by US mail. [59764]
12/19/12	60	Response to oral argument order from the Petitioner Robert J. MacLean designating Lawrence Berger as arguing attorney. Service: 12/17/2012 by US mail. [59766]
12/21/12	61	ORDER filed granting motion to unseal case [59] filed by Respondent DHS. By: Merits Panel (Per Curiam). Service: 12/21/2012 by clerk. [59768]
1/4/13	62	Citation of Supplemental Authority pursuant to Fed. R. App. P. 28(j) for Petitioner Robert J. MacLean. Service: 01/03/2013 by US mail. [59770]
1/7/13	63	Citation of Supplemental Authority pursuant to Fed. R. App. P. 28(j) for Respondent DHS. Service: 01/07/2013 by US mail. [59771]
1/9/13	64	Submitted after ORAL ARGUMENT by Mr. Lawrence Berger,

DATE	DOCKET NUMBER	PROCEEDINGS
		Esq. for Robert J. MacLean and Michael Paul Goodman, Esq. for DHS. Panel: Prost, Moore and Wallach. [59774]
1/10/13	65	Citation of Supplemental Authority pursuant to Fed. R. App. P. 28(j) and Correction of Oral Argument Citation for Petitioner Robert J. MacLean. Service: 01/07/2013 by US mail. [59778]
3/19/13	66	Clerk's Notice to Amici Curiae Joseph P. Carson, Elijah E. Cummings, Dennis J. Kucinich, Carolyn Maloney, Petitioner Robert J. MacLean and Respondent DHS (Notice to Parties Regarding Electronic Filing: This case has been assigned to the court's CMECF system. All further filings in this appeal must be made using ECF). Service: 03/19/2013 by clerk. [59780]
4/26/13	67	OPINION and JUDGMENT filed. The judgment or decision is: Vacated and Remanded. (Precedential Opinion). (For the Court: Prost, Circuit Judge; Moore, Circuit Judge and Wallach, Circuit Judge). Judge Wallach filed a concurring opinion.. [71934]

DATE	DOCKET NUMBER	PROCEEDINGS
5/3/13	68	MOTION of Respondent DHS to extend the time to file a Combined Petition for Panel Rehearing and Rehearing En Banc until 8/09/2013 at 11:59 pm [Consent: unopposed]. Service: 05/03/2013 by US mail, email. [74454]
5/7/13	69	ORDER filed granting-in-part motion to extend time to file petition for rehearing [68] filed by Respondent DHS. Respondent is granted a 30-day extension of time, until July 10, 2013, to file its petition for rehearing or rehearing en banc. No further extension will be granted. By: Merits Panel (Per Curiam). Service: 05/07/2013 by clerk. [75336]
7/10/13	70	Petition for panel rehearing, for en banc rehearing filed by Respondent DHS. Service: 07/10/2013 by US mail, email. [90813]
7/11/13	71	Notice of Deficiency to Respondent DHS, the following document is REJECTED for filing: petition for panel rehearing [70]. Reason(s): The combined petition for rehearing is overlong. Petitions are limited to 15 pages. The statement of counsel should be on page one; is REJECTED for filing: petition for en

DATE	DOCKET NUMBER	PROCEEDINGS
		banc rehearing [70]. Reason(s): The combined petition for rehearing is overlong. Service: 07/11/2013 by clerk. [90948]
7/11/13	72	(Corrected) Petition for panel rehearing, for en banc rehearing filed by Respondent DHS. Service: 07/11/2013 by US mail, email. [90985]—[Edited 07/17/2013 by LB]
7/17/13	73	18 paper copies of the petition for panel rehearing [72], petition for en banc rehearing [72] received from Respondent DHS. [92342]
7/31/13	74	The court invites a response from Petitioner Robert J. MacLean to the petition for panel rehearing filed by Respondent in 11-3231 , petition for en banc rehearing filed by Respondent in 11-3231. Service: 07/31/2013 by clerk [95212]
8/14/13	75	RESPONSE of Petitioner Robert J. MacLean to the petition for panel rehearing [70] filed by Respondent DHS in 11-3231 , petition for en banc rehearing [70] filed by Respondent DHS in 11-3231. Service: 08/14/2013 by US mail, email. [98157]
8/21/13	76	19 paper copies of the response [75] received from Petitioner Robert J. MacLean. [99354]

DATE	DOCKET NUMBER	PROCEEDINGS
8/30/13	77	ORDER filed denying [72] petition for panel rehearing; denying [72] petition for en banc rehearing filed by DHS. The mandate will issue on 09/06/2013. By: En Banc (Per Curiam). Service: 08/30/2013 by clerk. [100950]
9/6/13	78	Mandate issued to the Merit Systems Protection Board. Service: 09/06/2013 by clerk. [102025]
12/4/13	79	Notice from the Supreme Court of the United States granting extension of time to file writ of certiorari to December 28, 2013.
1/29/14	80	Petition for writ of Certiorari filed on 01/27/2014 in the Supreme Court of the United States. Supreme Court #: 13-894, Dennis J. Kucinich v. Department of Homeland Security.

[DHS SEAL]

Advisory

Title: Potential Al-Qaeda Hijacking Plot in the U.S. and Abroad

July 26, 2003

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OVERVIEW

Al-Qaeda continues to plan attacks against commercial aircraft in the United States and abroad.

DETAILS

Al-Qaeda planners have primarily considered suicide hijackings and bombings as the most promising methods to destroy aircraft in flight, as well as to strike ground targets. Cognizant of changes in aviation security measures since September 11, 2001, Al-Qaeda is looking for new ways to circumvent enhancements in aviation security screening and tightening immigration requirements. At least one of these attacks could be executed by the end of the summer 2003.

Attack venues may include the United Kingdom, Italy, Australia, or the East coast of the United States due to the

relatively high concentration of government, military, and economic targets. The extremists may plan to identify flights that transited the target country, so that the hijackers would not need visas for those countries.

The plan may involve the use of five-man teams, each of which would attempt to seize control of a commercial aircraft either shortly after takeoff or shortly before landing at a chosen airport. This type of operation would preclude the need for flight-trained hijackers.

The hijackers may try to calm passengers and make them believe they were on a hostage, not suicide mission. The hijackers may attempt to use common items carried by travelers, such as cameras, modified as weapons.

No equipment or operatives are known to have been deployed to conduct the operations.

SUGGESTED PROTECTIVE MEASURES

Airlines are reminded of their obligation to provide adequate security procedures at the airports for all passengers especially those passengers transiting the U.S. without visa. Airlines will identify to CBP any Transit With Out Visa (TWOV) passengers exhibiting suspicious behavior.

Advisories recommend the immediate implementation of protective actions, including best practices when available. The Department of Homeland Security (DHS) encourages recipients of this advisory to report information concerning suspicious or criminal activity to law enforcement, the DHS Watch Operations Center or the Transportation Security Intelligence Service (TSIS) watch office.

[DHS SEAL]

Department of Homeland Security
Immigration & Customs Enforcement
Office of Professional Responsibility

Office of Professional Responsibility
Report of Investigation

MACLEAN, Robert
Federal Air Marshal
Los Angeles, CA
200405873

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SUBJECT MACLEAN, Robert	CASE NUMBER 200405873

REVIEWED BY

DATE	NAME	SIGNATURE	REFERRED TO

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DEPARTMENT OF HOMELAND SECURITY
ICE

REPORT OF INVESTIGATION

1. TECS ACCESS CODE: 3
2. PAGE: 1
3. FILE ID: 200405873
4. TITLE: MACLEAN, ROBERT /TRAN/NON-CRIMINAL MISCON/DISTRICT O DC
5. FILE STATUS: CLOSING RPT
6. REPORT DATE: 06162005

7. ASSIGN DATE
   09162004

8. CLASS
   2

9. FILE DESC CODES
   1NO

10. RPT NBR.
    003

11. RELATED FILE IDS:

12. UNDVL LEADS TO:

13. TYPE OF REPORT:
    INVESTIGATIVE FINDINGS

TOPIC: UNAUTHORIZED MEDIA APPEARANCE—SUBSTANTIATED

14. SYNOPSIS:

On September 17, 2004, the U.S. Immigration and Customs Enforcement, Office of Professional Responsibility, Joint Intake Center, Washington, DC, received a Conduct Incident Report from the Department of Homeland Security, Immigration & Customs Enforcement, Federal Air Marshal Service. The report alleges that Federal Air Marshal Robert J. MACLEAN, Los Angeles, made an unauthorized media appearance on the NBC Nightly News television program.

An additional allegation of unauthorized release of information to the media was also uncovered during the course of the investigation.

15. DISTRIBUTION:
CH

16. ORIGINATOR: RUZEVICH THOMAS J
(TITLE) CRIM INVSTGR

17. APPROVED BY: GIBBONS JAMES M
(TITLE) SUPVY CRIM INVSTGR

18. ORIGIN OFFICE: CH
CHICAGO

19. PHONE: 847 981 3400

20. TYPIST: RUZEVICH

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BACKGROUND

On September 17, 2004, the U.S. Immigration and Customs Enforcement (ICE), Office of Professional Responsibility (OPR), Joint Intake Center (JIC), Washington, DC, received a Conduct Incident Report (CIR) from the DHS ICE Federal Air Marshal Service (FAMS). The report alleges that Federal Air Marshal (FAM) Robert J. MACLEAN, Los Angeles, California, made an unauthorized media appearance on the NBC Nightly News television program (Exhibit 1). An additional allegation of unau-

thorized release of information to the media was also uncovered during the course of the investigation.

ALLEGATION ONE: Unauthorized Media Appearance.

SUBSTANTIATED

ALLEGATION TWO: Unauthorized Release of Information to the Media.

SUBSTANTIATED

DETAILS OF INVESTIGATION:

ALLEGATION ONE: Unauthorized Media Appearance

On May 04, 2005, OPR/Chicago Senior Special Agent (SSA) Thomas J. Ruzevich and Resident Agent in Charge (RAC) James M. Gibbons, conducted an interview of FAM MACLEAN. Prior to conducting the interview FAM MACLEAN was provided with the following documents for his review and signature.

1. Administrative Interview Notice of Rights and Obligations (FAMS Form OMS F 2130 July 04).

2. Disclosure Warning for Non-Bargaining Unit Employees (Appendix C)

During the interview FAM MACLEAN admitted to appearing on the NBC Nightly News television broadcast on September 9, 2004, as the subject shown wearing a hood and identified only as FAM "Mike." FAM MACLEAN admitted that he did not obtain authorization from FAM management prior to making the aforementioned media appearance. FAM MACLEAN denied knowingly releasing, in any form, sensitive, secure or classified information to any unauthorized persons groups, or associations. Fol-

lowing the interview, FAM MACLEAN provided OPR/ Chicago with an affidavit dated May 4, 2005 (Exhibit 2).

ALLEGATION TWO: Unauthorized Release of Information to the Media.

On May 04, 2005, SSA Ruzevich and RAC Gibbons conducted an interview of FAM MACLEAN. Prior to conducting the interview, FAM MACLEAN was provided with the following documents for his signature and/or review:

1. Administrative Interview Notice of Rights and Obligations (FAMS Form OMS F 2130 July 04).

2. Disclosure Warning for Non-Bargaining Unit Employees (Appendix C).

During the interview FAM MACLEAN admitted that he spoke to MSNBC reporter Brock Meeks regarding three newspaper stories authored by Meeks. FAM MACLEAN admitted to providing Meeks copies of FAMS Las Vegas Field Office e-mails that mandated FAMS from that office compose one Surveillance Detection Report per month. FAM MACLEAN denied knowingly releasing, in any form, sensitive, secure, or classified information to any unauthorized persons, groups or associations. Following the interview, FAM MACLEAN provided OPR/Chicago with an affidavit dated May 4, 2005 (Exhibit 2).

On May 4, 2005, FAM MACLEAN provided OPR/Chicago with copies of the below listed items:

1. "Air Marshal pulled from key flights," by Brock Meeks, MSNBC, July 29, 2003 (Exhibit 3).

2. "TSA in 'witch hunt' Air Marshals Say'," by Brock Meeks, MSNBC, August 11, 2003 (Exhibit 4).

3. "Air Marshals struggle with 'growing pains', by Brock Meeks, MSNBC, August 4, 2004 (Exhibit 5).

4. "Flip-Flop on Air Marshal Schedules," by Brock Meeks, MSNBC, July 30, 2004 (Exhibit 6).

5. Six (6) FAMS Las Vegas Field Office inter-office e-mails dated from July 7, 2003 thru August 4, 2003 (Exhibit 7)

PROSECUTORIAL ACTION: N/A

PREVIOUS HISTORY/PAST ALLEGATION: None.

1. Copy of Federal Air Marshal Conduct Incident Report (CIR).

2. Affidavit of DHS ICE FAMS Robert J. MACLEAN, dated May 4, 2005.

3. Copy of MSNBC news story "Air Marshal pulled from key flights," by Brock Meeks, July 29, 2003.

4. Copy of MSNBC news story "TSA in witch hunt Air Marshals say," by Brock Meeks, August 11, 2003.

5. Copy of MSNBC news story "Air Marshals struggle with growing pains," by Brock Meeks, August 4, 2004.

6. "Flip-Flop on Air Marshal Schedules," by Brock Meeks, MSNBC, July 30, 2004.

7. Six (6) FAMS Las Vegas Field Office e-mails dated from July 7, 2003 thru August 4, 2003.

Exhibit 1

A verbatim recreation of the CIR is provided below.

-Begin-

Las Vegas Field Office (LASFO) based personnel believe Federal Air Marshal (FAM) Robert J. MacLean to be the hooded FAM "Mike" who appeared on NBC Nightly News on 9/9/04. The FAM complained of FAMS policies, implying that terrorists can easily identify and cut FAM's throats if dress code policies were not changed. If substantiated, his appearance would be in violation of internal directives.

SAC David R. Knowlton was on annual leave the week of 9/6-9/10/04 and did not view the NBC broadcast. On Saturday 9/11/04, LASFO ATSAC John Plunkett advised SAC Knowlton that FAM MacLean's former supervisor, ATSAC Michael Marzigliano, had watched NBC Nightly news on 9/9/04 and believed the voice of the hooded FAM to be that of MacLean based on his extensive contact with the FAM.

On 9/13/04, SAC Knowlton requested FAM Headquarters forward a video copy of the news broadcast. Also on 9/13/04 a LASFO FAM on TDY assignment, Michael Kopanski, telephonically advised he viewed the broadcast and believed the hooded FAM to be MacLean, based on voice recognition. SAC Knowlton was on emergency leave the afternoon of 9/13/04 and 9/14/04 due to a death in the family. The video was received at the LASFO on 9/15/04.

On 9/15/04, ATSAC Marzigliano confirmed what he had told ATSAC Plunkett, stating to SAC Knowlton that, based on voice and mannerisms, he unequivocally believed

the hooded FAM on NBC news to be MacLean, whom he had supervised. He also advised that subsequent to the broadcast, other FANS who served with MacLean came to him and opined it was MacLean. Also on 9/15/04, LASFO Operations Officer, Muriel Blackburn, advised she had viewed the video and opined it was MacLean. She further related that her staff had heard from other LASFO FAMs who viewed the broadcast and complained it was MacLean on NBC news. She also advised her staff had allegedly been informed that MacLean was upset that his voice had not been disguised, prompting him to request it not be further televised.

Finally, on 9/15/04, the video was shown to MacLean's current supervisor, ATSAC Charles Maurer. ATSAC Maurer opined that the voice of "Mike" was probably MacLean based on his personal contact with him.

FAM MacLean has been in TDY status to Los Angeles pending the birth of a child, which occurred this week. He is currently on Family Medical Leave. FAM MacLean has previously announced to this office that he is the "FAM vice president" of the Federal Law Enforcement Officers Association (FLEOA). He has not been interviewed concerning this matter.

FAM MacLean has no previous CIR's!

-End-

Exhibit 2

DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION & CUSTOMS ENFORCEMENT
OFFICE OF PROFESSIONAL RESPONSIBILITY

AFFIDAVIT

STATE OF:
COUNTY OF:

I, Robert J. MacLean, who after being duly sworn state the following:

Q: Please state your name, current position and post of duty?

A: Robert James Maclean, Federal Air Marshal, assigned Los Angeles Field Office.

Q. How long have you been employed as a Federal Air Marshal with the Department of Homeland Security?

A: Over 3 ½ years.

Q: What employment have you held prior to becoming a FAM?

A: US Border Patrol Agent—assigned San Diego Sector.

Q: Have you ever been interviewed by any television news organization?

A: Yes.

Q: Have you ever been interviewed by the NBC Nightly News Television program?

A: Yes

Q: Did you appear on the NBC Nightly News television broadcast of September 9, 2004 as the subject shown wearing a hood and identified only as FAM "Mike"?

A: Yes

Q: Did you have prior permission from the Federal Air Marshal management to appear on the aforementioned television newscast.

A: No

Q: Is that the only time you appeared on any television news program?

A: Yes

Q: What was the purpose of your appearing on the aforementioned television news program?

A: After FAMS management ignored mine and other FAMs' concerns regarding FAMS' checkpoint bypass procedures, aircraft boarding procedures, dress/grooming codes, mandatory hotel policy and FAMS managements constant desire to divulge Sensitive Security Information to news organizations such as CNN and NBC Nightly News. I reported these problems to the Oakland DHS/OIG office, but no Agents followed-up on my complaint.

Q: Who asked you to appear on the aforementioned television show?

A: Brock Meeks of MSNBC. I know him from 3 other stories I spoke to him about. I handed copies of these 3 articles to the investigators. There are: Air Marshal pulled from key flights, Brock Meeks, MSNBC, July 29, 2003; Air Marshals struggle with 'growing pains' by Brock

Meeks, MSNBC, August 4, 2004; TSA in 'witch hunt,' air marshals say by Brock Meeks, MSNBC, August 11, 2003.

NBC Producers Tom Costello and Mario Garcia from New York, NY conducted my interview over a phone line.

I have never provided any documents of any nature to Meeks, Costello and Garcia.

For the August 4, 2003 article, I read Meeks word for word the six July 7, 2004 through August 4, 2003 e-mails (submitted to the investigators) that mandated Las Vegas FAMS to compose 1 Surveillance Detection Report (SDR). This policy was a violation of the law, gross waste of funds, abuse of authority and overall gross mismanagement that endangers public health and safety. Mandating intelligence reports can misdirect valuable resources and get many people hurt or killed. None of these e-mails were labeled having "Security Sensitive Information."

For the July 29, 2003 article, I informed Brock Meeks that all Las Vegas FAMs were sent a text message to their Government issued mobile phones that all RON (Remain Overnight) missions up to August 9 would be canceled. My supervisor told me that the Service ran out of funds for overtime, per diem, mileage and lodging.

It is FAM policy that Sensitive Security Information will not be broadcasted via text messages to our Service issued mobile phones.

Q: Are you aware of any procedures/policies/directives regarding media contact?

A: Yes—ADM 3700 (Para 17) which prohibits contact with the media.

Q: Have you ever released, in any form, be it verbal, written, or otherwise, sensitive, secure, or classified information to any unauthorized person or persons, group or groups, association or associations?

A: No, not to my knowledge?

Q: If you were to seek permission for a media interview who would you contact?

A: I assume it would be the FAMS Director or the Public Information Office.

Q: Who is your current supervisor?

A: Jim Murray (ATSAC)

Q: Have you ever had the following persons act as your supervisor in any capacity (ATSAC Marzigliano, ATSAC Plunkett, ATSAC Charles Maurer)?

A: Yes, I worked under the supervision of ATSAC Marzigliano for approx. 1 year, ATSAC Plunkett may have been Acting ATSAC when ATSAC Maurer was on extended leave he (Plunkett) replaced him temporarily. ATSAC Maurer supervised me for approx. six months just prior to my transfer to the LA Field Office.

Q: Who is LASFO Muriel Blackburn?

A: She is a civilian Operations officer assigned to the Las Vegas Field Office. She did not supervise me in any capacity. I've known her since mid November of 2001.

Q: Do you have anything else to add to your statement at this time?

A: Thomas D. Quinn, the Director of the Federal Air Marshal Service, and his executive staff are setting up commercial aviation for catastrophic failure by violating the law, gross waste of funds, abuse of authority and overall gross mismanagement that endangers public health and safety. Their checkpoint bypassing procedures, aircraft preboarding procedures, mandatory hotel policy, dress and grooming codes and their policy of divulging Sensitive Security Information to the media.

Thomas D. Quinn's executive staff:

Robert F. Beyers, Deputy Director
John Novak, Assistant Director
George Papantoniou, Assistant Director
Raymond M. Dineen, Assistant Director
Collen Callahan, Assistant Director
Michael H. Weikert, Assistant Director
David Adams, SAC, Headquarters Public Information Office

Only the victims of the 9/11 attacks give me the strength and fortitude to accomplish my missions despite of the constant anxiety of having to counter a possible in-flight ambush made possible due to Director Quinn's deadly policies and gross mismanagement.

Regrettably, the following personnel continue to ignore Director Quinn and his executive staff's gross mismanagement:

Michael Chertoff, DHS Secretary
Richard L. Skinner, Acting DHS Inspector General
Randy Beardsworth, Acting Under Secretary for Border

Transportation & Security
Michael J. Garcia, Assistant Secretary of ICE

These individuals must stop allowing Director Quinn and his executive staff to threaten national security and listen to the rational advice of ONE of the only true advocates of commercial aviation security: Federal Air Marshal Frank Terreri.

Due to the fact that my chain of command, the DHS OIG and my Congressmen all ignored my complaints and would not follow them up with investigations, I have NO REGRETS or feel NO REMORSE for going to a credible and responsible media representative, Brock Meeks. Brock Meeks reporting these gross mismanagement issues has resulted in immediate and positive change in deadly FAMS policies.

The contents of this statement are true and correct to the best of my knowledge and belief.

Statement consists of 4 pages.

Subscribed and sworn to by

/s/ ROBERT J. MACLEAN

Before me this 4th day of May 2005,

/s/ THOMAS J. RUZEVICH
Thomas J. Ruzevich
Senior Special Agent
Department of Homeland Security
Immigration & Customs Enforcement
Office of Professional Responsibility

/s/ JAMES M. GIBBONS
James M. Gibbons
Resident Agent in Charge
Department of Homeland Security
Immigration & Customs Enforcement
Office of Professional Responsibility

[DHS SEAL]

ADMINISTRATIVE INTERVIEW
NOTICE OF RIGHTS AND OBLIGATIONS

Before we ask you any questions you must understand your responsibilities as an employee of the U.S. Department of Homeland Security, Federal Air Marshal Service.

This is a purely administrative inquiry. The purpose of this interview is to obtain your statement to questions concerning released SSI and unauthorized media appearances as it relates to your official duties.

You have a duty as an employee of the Federal Air Marshal Service to answer questions concerning the performance of your official duties. Your failure to answer questions posed to you, as they relate to your official duties, may cause you to be subjected to disciplinary action, including possible removal. Furnishing false information may result in criminal prosecution.

Any information or evidence you furnish in response to question put to you during this interview, or any information or evidence, which is gained through your answers, may be used against you in administrative proceedings.

I have read the above advisement and understand its contents.

ROBERT MACLEAN
Print Name

/s/ ROBERT MACLEAN 5/4/2005
Signature and Date

JAMES M. GIBBONS
Witness Name

/s/ JAMES M. GIBBINS 5/4/2005
Signature and Date

Exhibit 3

Air Marshals pulled from key flights

By Brock N. Meeks, MSNBC

July 29, 2003, Despite renewed warnings about possible airline hijackings, the Transportation Security Administration has alerted federal air marshals that as of Friday they will no longer be covering cross-country or international flights, MSNBC.com has learned. The decision to drop coverage on flights that many experts consider to be at the highest risk of attack apparently stems from a policy decision to rework schedules so that air marshals don't have to incur the expense of staying overnight in hotels.

SEVERAL AIR marshals contacted by MSNBC.com Tuesday confirmed that they were alerted via text messages on their TSA-issued cell phones to check their schedules for changes.

"All overnights, starting from August first through the ninth, were canceled," an air marshal told MSNBC.com. "My [supervisor] told me overnights for all [field offices] were being canceled for an indefinite amount of time," said the air marshal, who requested anonymity. "The supervisors said they only had time to change schedules through the ninth."

Current flight schedules, which run through the end of July, Thursday, are staying intact, another air marshal told MSNBC.com.

Federal air marshals are armed undercover agents deployed on U.S. airlines and authorized to use deadly force to thwart a terrorist incident. Prior to Sept. 11, 2001,

there were only a few dozen marshals who flew mainly on international flights. But after the Sept. 11, 2001, terror attacks, Congress authorized a huge increase in air marshals. From a pool of 250,000 applicants, a few thousand —the exact number is classified—were hired and given special advanced anti-terrorist training.

Several marshals told MSNBC.com that the program is suffering budget troubles and that the agency is looking to make cuts wherever it can. Recently, enrollment in upgraded training for air marshals, known as "Phase II," was suspended.

The TSA declined to comment on the details behind this week's schedule change. "The agency cannot comment on details of federal air marshal mission operations," said Brian Turmail, a TSA spokesman. However, "TSA remains committed to aviation security and will take all appropriate steps necessary to respond to credible threat information," he said.

As to the allegation that budgetary constraints were at the root of the pullbacks, Turmail said that all programs within the TSA are "subject to ongoing review." In addition, "TSA's current task is to balance the need to meet changing threats with the need to live within the agency's budget," he said. "The federal air marshal budget is under review to determine how best to meet these two objectives."

The move to pull air marshals from any flight requiring them to stay overnight is particularly disturbing to some because it coincides with a new high-level hijacking threat issued by the Department of Homeland Security. That

warning memo says that "at least one of these attacks could be executed by the end of the summer," according to a source familiar with the document.

The DHS memo also warns that new intelligence indicates that hijackers this time may simply try to crash the planes rather than fly them. "Hijackers may attempt to use common items carried by travelers such as cameras modified as weapons," and hijackers "may try to calm passengers" by making them believe they are only being taken hostage and "not on a suicide mission."

"Al-Qaida planners have primarily considered suicide hijackings and bombings as the most promising method to destroy aircraft in flight as well as to strike ground targets," the memo says. "Attack venues may include the United Kingdom, Italy, Australia or the East Coast of the United States due to the relatively high concentration of government, military and economic targets," the memo warns.

The cancellation of overnight stays has been floating around the air marshal rumor mill for weeks, based on conversations MSNBC.com has had with various sources in the air marshal program.

When the reality hit, several air marshals voiced their disbelief that the cutbacks were coming now, in the wake of newly issued warnings.

"The fact that this is coinciding with the new airline threats, it just blows our minds," an air marshal said. "We can't cover [every flight] but at least put us on the high-threat planes, the ones traveling across the country," the air marshal said, noting that the four planes hijacked on

Sept. 11 were all scheduled cross-country flights and therefore filled to capacity with aviation fuel. Not having air marshal coverage on those types of flights, "it's just plain scary," the air marshal said.

The air marshal program has been beset by a number of problems during its quick ramp-up from a few agents to thousands. MSNBC.com reported in June that more than 100 federal air marshals had been fired or stripped of their flight status for problems stemming from their security clearance background investigations. In addition, some air marshals were flying without having received their final security clearances, Transportation Security Administration sources said.

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Exhibit 4

TSA in 'witch hunt,' air marshals say
Homeland Security denies knowledge of formal investigation
by Brock N. Meeks, MSNBC, 11 August 2003

WASHINGTON, Aug. 11—The Transportation Security Administration is conducting a "witch hunt" to ferret out and discipline employees in the federal air marshal program who have talked to the media, several sources within the program told MSNBC.com. Some air marshals are even being threatened with having the USA Patriot Act, a law enacted to help fight terrorism, used against them. The Department of Homeland Security, which oversees the TSA, denies that any such investigation is taking place.

HOWEVER, A DEPARTMENT Of Homeland Security spokesman did acknowledge that an investigation is under way surrounding the circumstances involving a decision to pull air marshals from high risk flights in an attempt to save money at the cash strapped TSA, a story first reported in late July on MSNBC.com.

DHS is investigating "whether or not certain internal management decisions regarding federal air marshal scheduling were authorized," said Brian Roehrkasse, a department spokesman, "and if so, who may have authorized those."

Shortly after MSNBC.com reported that TSA was pulling air marshals from flights, based on information provided by sources within the air marshal program, an "investigative witch hunt was started," one air marshal who requested anonymity told MSNBC.com.

The air marshals work as undercover law enforcement officers aboard airlines: as such, they are often given access to classified mission information and therefore are made to sign documents pledging they will not divulge information to the media.

NO FORMAL PROBE

Roehrkasse said there has been no formal investigation aimed at uncovering persons within the air marshal program that might have leaked information to the media.

However, Roehrkasse did say DHS "will investigate any incidents" of employees disclosing what they know to be classified information. "Every government employee, including someone in the federal air marshal service, is prohibited by law from releasing sensitive classified information unless given express permission to do so," he said. And if an investigation found that that classified information was divulged outside the agency, it would be a violation of law and the person or persons "subject to arrest and prosecution," Roehrkasse said.

But some air marshals did speak to MSNBC.com about being pulled from high-risk flights because they believed that act alone hurt overall security.

The move on the part of air marshals to come forward drew a nod from Senate Democrats who blasted TSA for considering the move to pull air marshals from some flights simply because of budget woes.

"I want to thank the air marshals who came forward and told the truth about what was going on within their agency and bringing this issue into the spotlight," said Sen. Barbara Boxer, D-Calif., during a news conference, "because I

believe that cutting air marshals was clearly in the mix of budgetary cuts being considered."

Flip-flop on air marshal schedules

One air marshal told MSNBC.com that his entire field office was given an oral briefing and told "that an investigation is under way" and that in order to help find people talking to the media, "the USA Patriot Act was going to be used" to pull home phone and Internet records. Several other air marshals MSNBC.com heard from told similar stories of an investigation under way; one additional air marshal also mentioned that his supervisor had mentioned the use of the Patriot Act.

"If these allegations are true, they show misplaced priorities," said Rep. Carolyn Maloney, D-N.Y., chair of the Democratic Task Force on Homeland Security. "They shouldn't be going after civil servants doing their patriotic duty; they should be going after whoever made the boneheaded decision and whoever approved it at the OMB."

CAN'T INVOKE PATRIOT ACT

By law, however, the TSA isn't allowed to invoke the Patriot Act. That law was developed to give broader surveillance and prosecutorial power to law enforcement agencies in order to better combat terrorism.

Threatening to use the Patriot Act "is not an act of law, it's an act of intimidation," said Steven Aftergood, who runs the Project on Government Secrecy for the Federation of American Scientists. "The politics of this are the agency is trying to regulate what kind of interaction its employees have with the media and the general public," Aftergood

said. "That is something that raises questions of agency good faith."

And from here the next step is "for Congress to investigate the behavior of the agency because they are skirting, if they haven't crossed the boundary, of bad faith," Aftergood said.

That's exactly the thinking of Rep. Maloney; she sent letters to the chairmen of the House and Senate Judiciary committee and the chairman and ranking member of the House Select Committee on Homeland Security urging further action.

"[To] invoke, or threaten to invoke, the USA Patriot Act, a law meant to battle terrorism, to target patriotic employees seems to be not only illogical, but a misuse of the law as well," Maloney says in her letter the Judiciary committee leaders. "I urge your committee to formally investigate the alleged misuse of the USA Patriot Act by DHS for its internal probe of employees."

In the letter to the House Homeland Security Committee, Maloney asks that there be an investigation to find out whether DHS is pursuing an investigation into leaks stemming from those in the Federal Air Marshal program to determine if "resources are being misdirected."

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Exhibit 5

Air marshals struggle with 'growing pains'

Autonomy of field offices creates bumpy ride for rank-and-file

Federal Air marshals are shown here performing tactical training inside a retired airliner. On the job, they must adhere to a dress code that some say makes them easily identifiable.

By Brock N. Meeks

Chief Washington correspondent

MSNBC

Aug. 4, 2004

WASHINGTON—Nearly three years after the government's dramatic resurrection of the moribund Federal Air Marshal Service in the aftermath of 9/11, the agency is hitting turbulence as it struggles with what one agency official called "growing pains."

A recent incident, as well as a new ad hoc policy directive, indicates that the ride could be getting bumpier for the high-profile agency before it gets better:

- The incident involved two federal air marshals from the Cleveland office who were recently stopped from boarding the plane they were assigned to protect because of a dispute with an air marshal supervisor regarding the agency's dress code standards, MSNBC.com has learned. The plane then took off without any air marshals aboard.

- The policy directive, which applies to air marshals only in certain parts of the country, requires the submittal of least one "surveillance detection report" (SDR) per month, MSNBC.com has learned. These reports are used by rank-and-file air marshals to detail and track suspicious activity and are then analyzed by intelligence experts looking for possible terrorist trends. A directive mandating the submission of these reports creates a "ticket quota" mentality, one air marshal supervisor told MSNBC.com. Worse, such a mandate encourages filing bogus intelligence reports. "I had nothing to report, so I filed a false report," an air marshal told MSNBC.com when questioned about the effect of the policy.

Two federal air marshals were stopped from boarding the plane they were assigned to protect because of a dispute with a supervisor regarding the agency's dress code standards.

Both of these instances reflect the wide latitude supervisors of the agency's 21 field offices are given when interpreting and implementing agency policy. The situations suggest that agency policies can vary greatly from one field office to another, putting rank-and-file air marshals at odds with supervisors.

The dress code issue is perhaps the most visible example of the disconnect between management and working air marshals.

Air marshals have been upset with the agency's dress code since it was officially instituted early in the agency's life. Rank-and-file marshals claim the "suit and tie" dress code

makes them too conspicuous to other passengers and by extension, any terrorists who might be lurking.

Frank Terreri, president of the air marshal chapter of the Federal Law Enforcement Officers Association, called the dress code "deadly" in a letter last year to agency director Thomas Quinn and has lobbied him to modify it.

During a recent congressional hearing, Homeland Security Secretary Tom Ridge, when questioned on whether the dress code put marshals at risk, said the standards would be reviewed and changed if needed.

The agency declined to provide the exact language of its official dress code, citing operational security concerns. However, "there is flexibility [in the dress code] depending on what mission the [air marshal] is going to fly," said Dave Adams, a spokesman for the Air Marshal Service.

Adams declined, however, to comment specifically on the Cleveland dress code incident saying, "We do not discuss internal issues involving our personnel." However, Adams did say that the service "adheres to professional standards to instill confidence and respect to both passengers and crew, especially if an emergency arises at 30,000 feet."

The field office supervisors, "because of their vast experience as being senior managers within different [federal law enforcement] departments prior to [joining the air marshal service], do have some flexibility in their internal procedures or running their offices," Adams said.

Rogue policy?

The relative autonomy given to the field offices may have allowed some air marshal officials to overstep their authority by instituting an unauthorized intelligence reporting quota, MSNBC.com has learned.

"Beginning in July 2004, each FAM [federal air marshal] must prepare one SDR [surveillance detection report] per month," says an internal air marshal service e-mail obtained by MSNBC.com. "The object of this instruction is to make you more alert to your surroundings not to generate bogus reports. However, this is part of your performance appraisal and you must prepare one a month," the e-mail says. "There may come an occasion when you just don't see anything out of the ordinary for a month at a time, but I'm sure if you are looking for it, you'll see something."—Internal e-mail Federal Air Marshal Service.

Another internal e-mail obtained by MSNBC.com addressing the same issue says: "There may come an occasion when you just don't see anything out of the ordinary for a month at a time, but I'm sure if you are looking for it, you'll see something."

Part of the air marshals' job is to file SDRs "any time they see anything of a suspicious nature," Adams said. "Obviously the federal air marshals are out there everyday in the aviation domain and who better than them to know what's out of the norm?" noted Adams.

When asked about the mandatory SDR filing policy noted in the internal e-mails, Adams said "there is no mandatory requirement that [air marshals] must send in an SDR once

a month for any appraisal purposes," adding, "we want pertinent, valuable information sent in."

Growing room

Any disparity in policy among the various field offices should be chalked up to an agency that "is kind of like newly poured concrete," said one field office supervisor. "There just hasn't been enough time for the concrete to harden up."

This supervisor, who like others in this story spoke on the condition of anonymity, said the air marshal service is "still going through growing pains. . . . It's a matter of getting the agency built out," he said. "I think it's going to be the best place to work in federal law enforcement in a couple of years, to tell you the truth. And it will just take time for all these problems to sort out."

One of these long-standing problems within the agency has been a conspicuous lack of promotion of rank-and-file air marshals into supervisory positions. Until now.

"Applications are being vetted right now, and we anticipate, hopefully within the next 60 days, to announce some [promotions to] supervisory positions drawn from within the rank-and-file FAMs," Adams said.

Air marshals also are slowly expanding their roles in other areas of law enforcement, such as being assigned to work with various Joint Terrorism Task Forces, in which they work with other members of federal law enforcement on terrorism-related cases. In addition, the entire agency transferred from being under the control of the Transportation Security Agency into Immigrations and Customs Enforcement late last year. "

ICE offers the air marshal service multiple investigative resources, such as additional access to intelligence, better coordination with other law enforcement agencies, and broader training opportunities," said Michael Garcia, assistant secretary for the bureau, at the time of the move.

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Exhibit 6

Flip-flop on air marshal schedules

Air marshals will continue to fly on international, cross-U.S. trips

July 30—After MSNBC.com reported the new policy, the Transportation Security Administration said it would immediately begin scheduling air marshals back on cross-country and international flights. NBC's Pete Williams reports.

By Brock N. Meeks, MSNBC

WASHINGTON, July 30—In an apparent reversal of policy, the Transportation Security Administration will immediately begin scheduling air marshals back on cross-country and international flights, MSNBC.com has learned. The move comes less than 24 hours after MSNBC.com reported that air marshals were being pulled from those flights because of budget problems associated with the costs of overnight lodging for the marshals.

THE DEPARTMENT of Homeland Security on Wednesday blamed the confusion on a mixup in communication and said the department had been working with air marshal officials on Monday to correct the situation.

"America should know that every air marshal that we have is being deployed, and additional resources are being directed to that very critical mission," Homeland Security Secretary Tom Ridge said Wednesday in a speech. Part of the plan to add resources includes a recall of 100 air marshals now doing other jobs with TSA, a spokesman for the said.

WashPost: New hijack warnings

The dropping of marshals from flights that many experts consider to be at the highest risk of attack came to light Tuesday when several air marshals contacted by MSNBC.com confirmed that they were alerted via a "text message" on their TSA-issued cell phones to check their schedules for changes.

The marshals found that, beginning Friday, they had not been scheduled for any flights that would require them to stay away from home overnight. That meant no air marshal coverage on international or cross-country flights, the very kind targeted in the Sept. 11, 2001, terrorist attacks.

Dems renew call for security funding

The move to pull marshals from those flights was particularly disturbing to some because it coincided with a new high-level hijacking threat issued by the Department of Homeland Security. That warning memo said that "at least one of these attacks could be executed by the end of the summer," according to a source familiar with the document.

The TSA, which houses the air marshal program, has been under severe budgetary constraints, forcing cutbacks in several areas, including laying off of federal airport screeners and the recently announced suspension of advanced Phase II training for its agents, sources told MSNBC.com. The move to cut out flights requiring air marshals to stay overnight stemmed from those same budget problems, MSNBC.com was told by an agency source.

Sen. Charles Schumer, D-N.Y., called the cuts "nonsensical" in a letter Wednesday to Secretary Ridge. Schumer's letter urges DHS to "immediately reverse reported plans to cut air marshal service on coast-to-cost and international flights . . . in light of intelligence indicating that al-Qaida and other terrorist groups may have stepped up plans" to launch attacks on airlines.

Soft Target: airport security

Schumer's letter says that "according to statements by TSA officials, the "proposed cuts in the air marshal program come in response to a $900 million budget hole at the agency."

What is 'homeland security'?

President Bush has given former Pennsylvania Gov. Tom Ridge the job of managing the government's efforts to deter and respond to terrorist attacks. "Homeland security"—protecting Americans on U.S. soil—is a complex mission requiring the coordinated work of dozens of federal, state and local agencies.

Federal air marshals are armed undercover agents deployed on U.S. airlines and authorized to use deadly force to thwart a terrorist incident. Prior to Sept. 11, 2001, there were only a few dozen marshals who flew mainly on international flights. But after the Sept. 11, 2001, terror attacks, Congress authorized a huge increase in air marshals. From a pool of 250,000 applicants, a few thousand —the exact number is classified—were hired and given special advanced anti-terrorist training.

The program has been beset by a number of problems during its quick ramp-up from a few agents to thousands. MSNBC.com reported in June that more than 100 federal air marshals had been fired or stripped of their flight status for problems stemming from their security clearance background investigations. In addition, some air marshals were flying without having received their final security clearances, Transportation Security Administration sources said.

Exhibit 7

From: Maurer, Charles H.
Sent: Thu 08-Jul-04 8:13 AM
To: 25Squad5
Cc:
Subject: SDR

Beginning in July 2004 each FAM must prepare one SDR per month. The object of this instruction is to make you more alert to your surroundings not to generate bogus reports. However, this is part of your performance appraisal and you must prepare one a month.

——Original Message——

From: Plunkett, John R.
Sent: Wed 7/7/2004 5:34 PM
To: 25Squad3; 25Squad9
Cc:
Subject: SDRs

As you all know, completing and submitting SDRs is an important aspect of our job and is considered when evaluating a FAM's performance for each Quarter. Obviously, some FAMs have taken more of an interest in this aspect of our intelligence program. I say this because a significant number of FAMs have never submitted one. I can only encourage you to keep vigilant when transiting airports, etc. and when you see something suspicious, please consider sending a SDR. It doesn't have to rise to the level of PC, but if it looks out of place or the least bit suspicious, submit one.

The SAC has asked that we discuss this aspect of our job with all FAMs and fully expects everyone to participate on a monthly basis. There may come an occasion when you just don't see anything out of the ordinary for a month at a time, but I'm sure that if you are looking for it, you'll see something. I think some FAMs are hesitant about submitting SDRs for fear of being questioned by headquarters or their respective ATSAC. If it looks suspicious, but does not rise to the level of an interview, etc., send in a SDR.

John R. Plunkatt
ATSAC, Las Vegas FAM Field Office
(702) 263-8756

——Original Message——

From: Marzigliano, Michael S.
Sent: Wed 8/4/2004 1:28 PM
To: 25Squad7
Cc:
Subject: SDR Reports !!!

Guys,

As we discussed during squad meeting, there is a mandatory SDR (at least one) which should be done each month. Those of you that did not generate an SDR report for July 2004, I need a memorandum simply stating why. Keep it short and direct. Any questions call…

Mickey Marzigliano
ATSAC Squad 7

—Original Message—

From: Korniloff, Gregor
Sent: Wednesday, July 07, 2004 5:59 PM
To: Billy Williams; Charles Maurer; Craig Hamic; Douglas Hladky; John Plunkett; Michael Marzigliano; Roger Schofield

Subject: REMINDER-FAMs SDR REQUIREMENT

AS DISCUSSED DURING TODAY'S STAFF CONFERENCE, PLEASE REMIND YOUR SQUAD MEMBERS THAT EACH FAM IS NOW EXPECTED TO GENERATE AT LEAST ONE SDR PER MONTH.

GREGORY N. KORNILOFF
Assistant Special Agent-in-Charge
U.S. Immigration and Customs Enforcement
Federal Air Marshal Service
Las Vegas Field Office
OFF: 702-263-8756 (EXT: 562)
CELL: 702-523-1252
FAX: 702-263-0832
EMAI: kornig01@secureskies.net

—Original Message—

From: Williams, Billy J.
Sent: Thu 7/8/2004 11:24 AM
To: 25Squad6
Cc:
Subject: FW: REMINDER—FAMs SDR REQUIREMENT

Las Vegas FAMs continue to be last in the nation when it comes to generating SDRs. Some LAS FAMs seem to be doing all the reporting, while others are offering nothing. Conducting surveillance and generating SDRs is part of your performance agreement. SAC Knowlton has decided that ever LAS FAM must generate at least one SDR every month.

Billy J. Williams

Assistant to the Special Agent in Charge
U.S. Immigration and Customs Enforcement
Federal Air Marshal Service
LAS-209
Office (702)263-8756
Cell (702)499-1781
PDA (702)335-4038

----Original Message----

From: Hamic, Craig A.
Sent: Mon 7/12/2004 1:18 PM
To: 25Squad1; 25Squad10
Cc:
Subject: FW: REMINDER—FAM's SDR REQUIREMENT

DEAREST MEMBERS OF SQUAD -1 AND SQUAD -10,

ALL FAMS IN THE AFOREMENTIONED SQUADS ARE REMINDED AND EXPECTED TO GENERATE ONE SDR A MONTH. PLEASE BE REMINDED THAT SDR'S ARE ONE OF THE MANY CRITERIA YOU ARE BEING EVALUATED....THANK YOU FOR COMPLYING WITH THIS

OFFICE ORDER. YOUR LOVING ATSAC, CRAIG....

——Original Message——

[Seal omitted]

NEW YORK

Senator Hillary Rodham Clinton

STATEMENTS & RELEASES

July 30, 2003

Senator Clinton Reiterates Call on TSA to Justify Security Cuts at Nation's Airports

Recent reports of threats to airlines make proposed cutbacks even more disturbing

Washington, DC—Today, Senator Hillary Rodham Clinton (NY), in a letter to Admiral James M. Loy, Administrator of the Transportation Security Administration, reiterated her calls on the Transportation Security Administration (TSA) to justify its decision to cutback on security personnel at the nation's airports. Additionally, Senator Clinton sent a letter to Secretary of Homeland Security Tom Ridge, expressing her concern that a loophole in U.S. immigration law may make it easier for terrorists to carry out their plans.

"At a time when news reports indicate that terrorists may again be plotting suicide missions to hijack commercial airliners on the East Coast, we should not be cutting airport screeners and law enforcement personnel at our nation's airports, and air marshals on our planes—we should be fighting them with every resource we have," said Senator Clinton. "We need to ensure that there are sufficient resources because we know that by having a strong defensive presence, we can actually deter terrorists from carrying out terrorists plots. I implore the TSA to reconsider the changes in the reduction of screeners and law enforcement

personnel at our airports and air marshals in our planes. We need to be more vigilant, ever present, and prepared. The American people deserve no less."

Reports indicate that the Administration is planning to cut the number of screeners and law enforcement personnel at the nation's airports. There are also additional cuts proposed for the end of September. Some part-time screeners have been hired, but this is a half-measure and simply inconsistent with the nation's aviation security needs. Additional reports today indicate that the Federal Air Marshal Service has also cut training for Washington-area marshals and canceled critical flight missions because those missions would have required air marshals to spend the night at a hotel.

Further reports indicate that some airports, such as JFK, may have particular threat concerns because of the number of international passengers traveling to and connecting through those airports. Intelligence information indicates that terrorists were considering exploiting a visa loophole that would enable someone, without a U.S. visa, to take a flight from a country with less-stringent security to a US airport—as part of a layover—before taking a second connecting flight to the destination country.

In May of this year, Senator Clinton wrote to TSA Administrator Admiral Loy asking why proposed cuts in the screener workforce at New York airports appeared to be disproportionate to cuts made at other airports around the country. Two weeks later, Senator Clinton wrote to Admiral Loy again after learning about plans to reduce the number of law enforcement personnel at key screening checkpoints at our nation's airports. In early June, Sena-

tor Clinton also wrote Secretary Ridge raising these same issues. While Senator Clinton has received a response from both Admiral Loy and Secretary Ridge, she is not satisfied that enough is being done to protect our nation's airports.

[A copy of Senator Clinton's letters to Admiral Loy and Secretary Ridge are attached]

July 30, 2003

- Admiral James M. Loy Administrator,
Transportation Security Administration
400 7th Street, SW
Washington, D.C. 20590

Dear Admiral Loy,

Thank you for your letter of May 19, 2003, regarding the screener reduction process. In my original letter to you, I expressed concern that New York State is bearing such a disproportionate share of cuts in airport screeners. I also wrote to Secretary Ridge with similar concerns.

I am still quite unclear about the proposed screener cuts and how exactly they will affect New York State. Although your response was helpful, it did not address exactly why New York seemed to be losing a greater percentage of screeners than other states. I would appreciate an explanation as to why New York, which has a high risk of terrorist activity and several border crossings, would face disproportionate screener cuts.

I have reviewed the newer planned cuts for screeners in order to attempt to determine the impact on New York.

However, I understand those numbers include cargo screeners, which obfuscates the severity of the overall cuts. It is unclear to me exactly what kind of cuts will be made, and exactly why those specific cuts will be made. I know that part-time screeners will be used in some cases, but it is unclear how many and where.

I am writing to you to request a detailed explanation of all of these things. I would like to know how many screeners of all types, cargo and passenger, part-time and full-time, are at all New York airports now and how many will be there when you have completed your cuts. I would like to know how these numbers compare to nationwide numbers, and if there is a difference, I would like an explanation for that difference. Finally, I would like to know the exact method used to determine where cuts were to be made. Thank you for your help in this matter.

Sincerely,

Hillary Rodham Clinton
July 30, 2003

The Honorable Tom Ridge Secretary United States Department of Homeland Security
Washington, D.C. 20528

Dear Mr. Secretary:

I am writing to express my concern about recent intelligence information reported in the press indicating that there are specific terrorist plots on the East Coast involving United States passenger airlines, and that a loophole in

U.S. immigration law may make it easier for terrorists to act.

Specifically, I understand that intelligence information indicates that terrorists were considering exploiting a loophole in U.S. immigration law that would enable someone, without a U.S. visa, to take a flight from a country with less-stringent security to a U.S. airport and possibly roam that U.S. airport during a layover before taking a second connecting flight to the destination country. For this reason, a number of major international airports based in the U.S., including New York's John F. Kennedy airport, may have particular threat concerns because of the number of international passengers traveling to, and connecting through, those airports.

It was also reported that while some airports require passengers without U.S. visas to remain in a secured area during a layover, it is extremely discomforting knowing that this is the most security that could be imposed on a possible terrorist. I would appreciate knowing at your earliest convenience what measures are being taken to address this issue and to improve security measures at our nation's airports.

I also want to reiterate my extreme concern with the Transportation Security Administration (TSA) proposal, in the face of these serious threats, to cut the number of air marshals by canceling critical flight missions because those missions would have required air marshals to spend the night at a hotel. I understand that the TSA and the Department of Homeland Security have reconsidered this position. I hope that as long as our nation continues to face the threat of terrorism here at home—particularly

when there is intelligence indicating specific threats—that the Department will do its utmost to provide the strongest aviation security possible.

Thank you for your attention to this urgent matter. I look forward to receiving your response.

Sincerely yours,

Hillary Rodham Clinton

CC: Anthony Coscia Chairman Port Authority of New York and New Jersey

Joseph Seymour Executive Director Port Authority of New York and New Jersey

Newsroom: Press Releases

Press Release of Senator Lautenberg

Lautenberg Furious Over Initial Plan by Bush to Slash Federal Air Marshals, Shocked That Budget Cuts to Homeland Security Occurring as New Al Qaeda Threats Emerge

Wednesday, July 30, 2003

Washington, D.C.—Senator Frank R. Lautenberg today lashed out at the President for his latest plan to weaken nation's homeland security by slashing federal funding for Air Marshall Service on commercial airliners at the exact time Al Qaeda has issued new threats to use planes as weapons of terror. In a letter to Bush, Lautenberg hoped the President would reconsider these cuts and restore the funding necessary to keep Americans safe from terror.

"You have to ask yourself: What are they thinking? First, the Administration issues an alarming statement that puts fear into the public, then they want to scale back security on airplanes. Does the left arm know what the right arm is doing over at the Department of Homeland Security?" said Lautenberg.

In a letter sent to the President today, Lautenberg and several of his colleagues expressed alarm over reports that his Administration has decided to remove air marshals from a number of critical cross country flights. The following is an excerpt from the letter.

"This decision by your Administration is especially shocking given the alert issued to the airlines this week warning of impending potential hijackings by terrorists. In fact, in

a statement released by the Department of Homeland Security (DHS) yesterday, in an attempt to calm the public, DHS specifically credits "air marshals" as a critical component of increased airline security."

During a press conference just this morning, President Bush said the following to a question on the latest reports of new Al Qaeda threats. "We do know that Al Qaida tends to use the methodologies that worked in the past. That's, kind of, their mindset. And we've got some data that indicates that they would like to use flights—international flights, for example."—President George W. Bush, Rose Garden news conference, July 30, 2003

"We made a pledge to the American people: that we will put homeland security first. But the Administration is putting tax cuts for the wealthy ahead of protecting everyday American families," said Lautenberg.

Press Release Contact: Afshin Mohamadi

For Immediate Release 202-225-7944

August 11, 2003

DHS FIGHTING AIR MARSHALS INSTEAD OF TERRORISTS

Task Force Chair calls for Congressional investigations following latest startling report about "witch hunt" in air marshals program

Homeland Security Committee asked to investigate internal probe; Judiciary asked to look into misuse of Patriot Act

WASHINGTON, DC—According to a news report today, the Department of Homeland Security (DHS) has turned on some of its most vital employees by conducting a "witch hunt" of Federal Air Marshals (FAMs) to determine the source of previous news reports that FAMs would be cut from flights to save on hotels. Today's report is the latest eye-opening story about the internal management of the FAM program and has raised new questions about whether the Transportation Security Administration (TSA) is more concerned with internal politics than it is with properly securing America's airliners. In response to today's report, Rep. Carolyn Maloney (NY-14), Chair of the Democratic Task Force on Homeland Security, called on her colleagues to investigate the internal TSA probe and the agency's reported threat to use the USA Patriot Act on its own employees.

In separate letters, Maloney asked the Chairmen and Ranking Members of the Senate and House Judiciary

Committees to investigate the Patriot Act issue, and she asked the Chairman and Ranking Member of the Select Committee on Homeland Security to investigate the so-called "witch hunt."

"They're targeting the wrong people," said Maloney. "They should be exhausting their resources zeroing in on terrorists, not patriots."

"I applaud and support the patriotic civil servants who have helped keep air travelers safe. It is appalling that the agency would turn on its own patriotic employees in this misguided game of 'gotcha.' It is even more disturbing that they would threaten to use a law meant to get terrorists to nab their own civil servants who were doing their duty."

MSNBC.com, in a story titled, "TSA in 'witch hunt,' air marshals say," reported that since initial reports two weeks ago that TSA was prepared to pull air marshals from flights to save on hotels, the agency has actively pursued the source of those reports. DHS officials denied that the "witch hunt" is underway, though MSNBC.com's sources say otherwise.

LETTER TO JUDICIARY COMMITTEES:

The Honorable Orrin G. Hatch
Chairman, Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Member, Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable F. James Sensenbrenner
Chairman, House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Conyers Jr.
Ranking Member, House Committee on the Judiciary
B-351-C Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Hatch, Ranking Member Leahy, Chairman Sensenbrenner, and Ranking Member Conyers,

Today's news report ("TSA in 'witch hunt,' air marshals say", MSNBC.com, August 11, 2003) that the Department of Homeland Security (DHS) is on a "witch hunt" within the Federal Air Marshals (FAM) program to determine the source of previous news stories is unsettling. That DHS would reportedly use or threaten to use the USA Patriot Act to track down the leak is even more disturbing.

As you probably remember, news reports two weeks ago citing sources familiar with the FAM program claimed that DHS was prepared to remove FAMs from certain flights to save on hotel costs. I was one of many who were appalled at that illogical decision, particularly in the wake of new terrorist threats to airliners. In the face of the public furor, DHS reversed course, stating that FAMs would remain on all flights

I applaud and continue to support the patriotic civil servants who brought to light the agency's illogical decision to leave flights unguarded; they have helped to keep our airliners secure. For DHS to target them instead of devoting all of its resources to defending against terrorism and

investigating its own decision-making process is misguided and vindictive.

Furthermore to invoke, or threaten to invoke, the USA Patriot Act, a law meant to battle terrorism, to target patriotic employees seems to be not only illogical, but a misuse of the law as well. I urge your committee to formally investigate the alleged misuse of the USA Patriot Act by DHS for its internal probe of employees.

At the time of the initial news reports, I urged the House Select Committee on Homeland Security to conduct an investigation of the decision-making process at the Department of Homeland Security (DHS), and that request stands. In the wake of today's report, I also strongly urge that committee to investigate DHS's alleged probe of its own employees. We need to know if resources are being misdirected for, as today's press report call it, a "witch hunt."

The allegations from today's news report are serious and unsettling. I thank you for your consideration and assistance in uncovering the truth.

Sincerely,

CAROLYN B. MALONEY

Member of Congress

Air marshals back to long flights

By Mimi Hall and Fred Bayles, USA TODAY

WASHINGTON, 08/01/2003—The Department of Homeland Security hastily cancelled a fledgling plan Wednesday that would have taken federal air marshals off long-distance flights to cut costs. Secretary Tom Ridge pledged to maintain the security program amid warnings of possible new terrorist attacks.

The about-face came after some marshals were informed of schedule changes that would bump them off flights requiring overnight hotel stays. That would have left most international and cross-country flights, such as those hijacked by terrorists on Sept. 11, 2001, without the added security.

The placement of air marshals on U.S. airlines was one of several measures taken by the federal government to tighten aviation security after the Sept. 11 attacks. In addition, passengers and luggage were put through more elaborate screening, and cockpit doors were reinforced. Now, some pilots are being trained to carry guns.

An estimated 4,000 armed and plainclothes marshals ride in the cabins of commercial airlines. The exact number and percentage of flights is classified.

"Americans should know that every available air marshal is being deployed, and additional resources are being directed to this critical program," Ridge said.

After first denying that air marshals would have been shifted, the Transportation Security Administration acknowledged Wednesday that schedules had been changed

late last week. "Those actions were premature and a mistake by the people who were involved," the agency's spokesman, Robert Johnson, said. A source in the air marshal program said long-haul flights were put back into schedules over the past two days.

The controversy erupted after the Homeland Security Department warned of a possible hijacking plot involving five-man teams that might try to seize planes and fly them into government, military or economic targets.

President Bush acknowledged a "real threat" that al-Qaeda could try to carry out another such attack. But he said, "I'm confident we will thwart the attempts."

CNN, citing an anonymous government source, said Thursday that some of the information on the latest threat came from a high-level al-Qaeda member being held at Guantanamo Bay, Cuba.

Ali Abd al-Rahman al Faqasi al-Ghamdi—allegedly one of the key organizers of the May 12 suicide bombings in Riyadh, Saudi Arabia, that killed 23 people, including nine Americans—gave information concerning possible hijackings, CNN said.

In Congress, the possibility of schedule changes in the marshals program sparked an outcry. "Given the potential fallout of another attack that intelligence reports suggest is on the way, it is incredible that the TSA would consider reducing the air marshal presence on these flights simply to save the cost of an overnight hotel room," Sen. Charles Schumer, D-N.Y., said.

The TSA, which is part of the new Homeland Security bureaucracy, faces a $900 million budget gap. It has asked

Congress for permission to cut $104 million from the air marshal program. Johnson said the cuts would be made by postponing training and hiring of support staff.

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

Docket No. SF-0752-06-0611-I-1

ROBERT J. MACLEAN, APPELLANT

v.

DEPARTMENT OF HOMELAND SECURITY TRANSPORTATION SECURITY ADMINISTRATION, AGENCY

DEPOSITION OF ROBERT J. MACLEAN

Irvine, California
Wednesday, Aug. 2, 2006

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* * * * *

APPEARANCES:

On behalf of the U.S. Department of Homeland Security:

EILEEN DIZON CALAGUAS, ESQ.
Transportation Security Administration
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(650) 616-4113

On behalf of the Witness:

PETER H. NOONE, ESQ.

Law Offices of Avery, Dooley, Post & Avery:
90 Concord Avenue
Belmont, Massachusetts 02478
(617) 489-5300

* * * * *

[103] individual.

Q When you were speaking with other FAMS about this text message, did you verify that they too also received the same text message?

A Correct. I also verified that they had received the same information about the fact that the missions were being canceled.

Q The FAMS that you did speak to about this text message, were they all from the Las Vegas field office?

A Yes.

Q Did you speak to any other FAMS about this text message that were not out of the Las Vegas field office?

A I don't remember.

Q When you shared this text message with Brock Meeks, did you have an understanding as to what he would do with the information?

A Yes, I knew he was going to report it. He was going to write a story about it, immediately, and he was also going to contact senators and other responsible Government employees.

Q When speaking with Meeks, did you ask to [104] remain anonymous?

A Yes. In the article, I asked to remain anonymous.

Q Did you know whether or not he would quote you as someone that was anonymous?

A He promised that he wouldn't quote me, that he wouldn't use my name.

Q He wouldn't use your name, but you understood that he would be quoting the text message that you shared with him, correct?

A I don't know. I don't remember that much.

Q Did you tell him not to quote the text message that you shared with him?

A No, I didn't ask him.

Q How did you know that he would contact Senators?

A He told me so.

Q Did you contact any senators about this text message?

A No.

Q Did you contact any other Government officials about this text message?

* * * * *

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

Docket No.: SF-0752-06-0611-I-2

APPEAL OF

ROBERT J. MACLEAN, APPELLANT

v.

DEPARTMENT OF HOMELAND SECURITY, AGENCY

Thursday, Nov. 5, 2009

CORRECTED TRANSCRIPT
OF THE
VIDEO-TELECONFERENCE HEARING

BEFORE:

ADMINISTRATIVE JUDGE FRANKLIN M. KANG
U.S. Merit Systems Protection Board
Western Regional Office
201 Mission Street, Suite 2310
San Francisco, California 94105-1831

HEARING LOCATION:

U.S. Merit Systems Protection Board
Western Regional Office
201 Mission Street, Suite 2310
San Francisco, California 94105-1831

Telephone: (415) 904-6772
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APPEARANCES:

For the Appellant (via video from the MSPB Washington, D.C.):

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From the Agency:

HEATHER BOOK, ESQ. (via video from the MSPB Washington, D.C.)
U.S. Department of Homeland Security
Transportation Security Administration

EILEEN DIZON CALAGUAS, Attorney Advisor
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Manteca, California 95336-9124

* * * * *

[68] with their expulsion from the hearing rooms.

To the extent that any SSI may be discussed, I informed—I informed the parties previously that I would consider any Agency objections to this effect as such objections are raised. So that may include, at minimum, the clearing of the hearing room, as I determine at that time.

Anything else before we swear in the witness?

Ms. Calaguas?

MR. BERGER: Not from Appellant.

MS. CALAGUAS: Not from the Agency, Your Honor.

JUDGE KANG: All right.

MR. BERGER: And not from the Appellant.

JUDGE KANG: Thank you.

Mr. MacLean, do you have any objections to swearing an oath before testifying before me?

MR. MACLEAN: No, Your Honor.

JUDGE KANG: I'll turn your sound up a bit.

Have a seat, Mr. MacLean.

Ms. Book, would you mind moving? There may be some papers near the microphone. Just if you could keep any papers away from there. We can hear a lot of shuffling on our end.

All right. Thank you. That's much better.

Whereupon,

ROBERT JAMES MACLEAN,

Appellant, witness for himself and called by the Agency, was [69] first duly sworn by Administrative Judge Kang, and was examined and testified as follows:

THE WITNESS: Yes, Your Honor.

JUDGE KANG: Okay. Please state your and, spelling your last name for the record.

THE WITNESS: Robert James MacLean, M-a-c-L-e-a-n.

JUDGE KANG: All right. Did you wish to allow Mr. Berger to question him first, Agency, or did you want to start with the questioning? He is a mutually-approved

witness, and I have the discretion to when either of you starts.

MS. CALAGUAS: Yes. I have no objections to the Appellant's representative questioning him first.

JUDGE KANG: Okay. Mr. Berger, the witness is yours.

MR. BERGER: All right. Thank you very much, Your Honor.

DIRECT EXAMINATION

BY MR. BERGER:

Q. Mr. MacLean, did there come a time when you were appointed to the position of a Federal Air Marshal?

A. Yes. It was October 14th of 2001.

Q. And is that a position that you had applied for?

A. Yes, sir.

Q. And why did you apply to become a Federal Air Marshal?

A. It was immediately after the 9/11 attacks. I wanted to—I wanted to serve. I was definitely moved by what happened [70] after the attacks. And I immediately applied and the FAA wanted to put me in their first class of Federal Air Marshals to graduate after the 9/11 attacks.

Q. So you were a trainee in the first class of Air Marshals after the 9/11 attacks?

A. Yes, sir, to graduate after the attacks.

Q. And when did you commence this training?

A. It began October 14th of 2001.

Q. And when did the training end?

A. The middle of November of 2001. I believe it was perhaps the—the first part of the second week of November of '01.

Q. The training was for approximately a month?

A. Yes, sir.

Q. And can you just tell us, to the best of your recollection, what the training consisted of?

A. It was a lot of firearms. It was—we were supposed to get—they wanted us—they wanted to get the most experienced applicants in this class because we were going to develop a syllabus for all future classes.

So most of the time—we were already very firearms proficient. We were—we were—I was an instructor with the—with the INS, formerly the INS as a Border Patrol Agent. So our job was—we did a lot of sitting around and brainstorming of how we could develop a training syllabus for the Agency.

So then there was some—there was—there wasn't [71] even physical training. All it was was just firearms proficiency and—and brainstorming to develop a training syllabus for the Agency.

Q. How soon after you graduated from that training were you actually put into the field in airplanes?

A. Almost immediately.

Q. During the course of the training was there any discussion or training regarding SSI material or information that you've since learned is characterized as SSI?

A. There was—there was never—right—right when we were put into that class, there wasn't even a—there was nothing—nothing discussed about sensitive security information.

But there was a term used a lot, which was "sensitive information." It just missed—it just didn't have "security."

But there was—so we didn't even call it SSI. There was a discussion of your flight numbers and—and flight times and the airlines that you were flying was sensitive information. It wasn't till months later where there was a—I remember reviewing a very thick pamphlet of a policy going into—into detail of—of what was SSI.

Q. Okay. So during the course of your training, before you were placed into the field, you have no recollection of actually receiving any type of formal training regarding SSI?

A. No, sir.

[72]

Q. Did there come a time after you graduated from your training and you were in the field that you became familiar with the concept of sensitive security information, or SSI?

A. Yes.

Q. And approximately when was that?

A. Several months after graduation, so I believe it—it would have probably been in the first quarter of 2002.

Q. And you may have alluded to this earlier, but to the best of your recollection can you describe how you became familiar with the SSI policy of the Agency?

A. We sort of had on a—it was an administrative day, very informal. We were—we were distributed a list of—of issues that you just didn't—you didn't discuss, such as we were—we were given scenarios saying that some Air Marshals in the past had gotten in trouble for telling their significant others where to pick them up exactly, which gate, and which airline they were flying. It said a lot of guys have been—gotten in trouble and were fired for that, so you want to completely avoid it.

So if somebody needs to pick you up from the airport, you need to give them a window and tell them, for instance, a baggage claim area, not an exact flight number and airline that they'll be—you'll be flying in on.

Q. All right. Now other than this sort of anecdotal type of training, was there any formal training on SSI material, [73] anything like that? Structured, formal, coherent training.

A. Well, there were—there were a lot of publications that we were—that we were given. I—I don't remember exactly, but I believe there was a—there was a master—there was a master folder that had probably a quarter-inch thick of—of SSI policies, just very wordy.

And you had to—you had to sign a acknowledgement that you—you—you read the policy and understood it.

Q. Okay. And after—did you look at that policy? Do you have any recollection of looking at the policy, or the manual, or the pamphlet?

A. No. I—I did not read it line for line, because there was a—the—eventually he was—became the Special Agent in Charge—he summarized, you know, what—what was SSI and what was not.

Q. And who was the "he"?

A. His name is—at the time he was the Acting Special Agent in Charge, Douglas Hlavka, and I believe now he is the—the—appointed Special Agent in Charge.

Q. Okay. And at that time did you—did there come a time when you formed some opinion or conclusion as to what SSI information was?

A. Yes, I did.

Q. And what was your understanding of what SSI information was?

[74]

A. Air- —airlines and their flight numbers.

Q. Anything else?

A. There was—there was also the exact seating assignments on an aircraft. We—you didn't—you did everything you could to try to not expose your identity so that—

Q. Okay.

A. —passengers didn't know where you were exactly sitting.

Q. And was there any discussion as to the mode of communicating SSI information?

A. Yes.

Q. Tell us what you understood the mode of communicating was.

A. It had to be in some form of secure manner. If it—if it was done electronically, it had to be—it had to be done on government email. They were very—they were very adamant about they didn't want people sending—receiving their schedules on their personal email accounts. That was—that was an issue. It had to be through the government—government email system or your encrypted, password-protected PDAs, personal data assistant Sorry.

Q. So when you were sent out into the field, what kind of devices were you given for the purpose of communicating with management?

A. Early—early in the program we were given these—they were sort of like a—they were these little PDAs. And I'm trying to think of the brand it was, but it was a—it had an [75] —it had an alphanumeric keyboard on it. It was black, and it folded into kind of like a small shell.

And all it did—it wasn't a phone, but it was cellular. It was—it was a pager that had an alphanumeric—you could send—it was a two-way pager with an alphanumeric keyboard. And that was issued to us by the—the FAA.

Q. And what is your understanding of the reason why the FAA issued that to you?

A. So they can communicate to us information that was sensitive.

Q. Okay. And what was it about the PDA that, in your mind, allowed it to be used for sensitive information?

A. Let me correct you. I probably confused you. I wouldn't characterize it as a PDA. It was—it was—it was simply a two-way pager. You couldn't interact. All you could do was receive the message and then type out a message.

We got a more complex PDA later in the program.

Q. When did you get the more complex PDA?

A. I believe it happened in early—it happened either late 2002 or early 2003.

Q. Okay. However, let's start with the initial, less-complex PDA.

A. Yes.

Q. What was it about that PDA that—that—why did you —why did you conclude that that was for sensitive information? On [76] what basis do you say that?

A. I believe you needed a—it—it didn't have a password-protection device on it. And I—if you opened it or lost it, somebody would have had to have a—a combination for it. I'm not sure exactly what was the—what you had to do in order to read messages.

Q. Okay. And when you received that less-complex PDA device, did the Agency give you any other devices to effect communication?

A. Yes. They recalled the—the—the two-way pager with the keyboard on it.

Q. Well, I understand that. But during the period of time that you used that less-complex PDA device, was there any other device that the Agency gave you to effect communication?

A. No. They made us—they made us either use our personal cell phones, or we had to call a—a toll-free number on pay phones.

Q. Okay. Now there came a time when you received a more complex PDA?

A. But in between—when they took away the black one,—

Q. Yes.

A. —that's when they gave us the really plain—I believe it had about 12—it just had a numeric 1, 2, 3. It was just a plain old Nokia cell phone. I think at one time everybody had one of these. I mean even the world.

[77]

Q. Oh, okay.

A. It was just a very common, because—it was just a sleek, plain old cell phone. And that's what they gave us after the—after the—the first one the FAA gave us.

Q. Okay. So at the time that you received the more complex PDA, you also had an Agency-issued cell phone?

A. Yes.

Q. Now was the more complex PDA also encrypted, to your knowledge, for sensitive information?

A. Yes. It had not—only did—you had to—in order to use it or read messages on it, there was sort of like the home screen. If you pushed any button, what you would get was—was a blank screen with a—with a line where you had to type in an alphanumeric password.

And they—and the Agency assigned us those passwords. And I believe it was—it was a combination of our —of our first name and our—I'm sorry—of our full name, different letters, and numbers from our Social Security number. And you—you punched it in. It opened it up so you could use it, but the encryption software that it had in the—it had encryption software inside the—the PDA.

Q. Okay. And in opening up a PDA like that and looking at information, to your knowledge were there any markings associated with sensitive information, any markings at all, or labels or . . . ?

[78]

A. I don't ever remember a—a message sent to—a text message sent to the PDA that had markings.

Q. Okay. But did you understand that messages sent to the PDA were sensitive?

A. It had that potential. I figured if—if they weren't going to send—if they didn't send text messages to the plain Nokias, if it was sent to the PDA, I assumed that it is more sensitive—it has some sensibility [sic] to it.

Q. Okay. Now what about—at the time that you had this PDA you also were issued a—you say a cell phone?

A. Yes, the Nokia cell phone.

Q. Did the cell phone have any of the encryption protections or any other protections that—for—set for information the PDA had?

A. No. You just turned it on and used it. But to check your voicemail, you had to punch in a password. When you got the prompt, and then you typed in your—your—your PIN.

Q. Okay. Now in—tell us in your own words what happened in July of 2003 when you received a certain text message on your cell phone concerning overnight flights?

A. Yeah. I could tell you there—there was a build-up between when I got hired, probably in the mid- —the summer of 2002 up until July of '03 there were—there were policies that the Agency put in place where we had to have a very strict business dress code.

[79]

We had—it was a military-grooming standard where you couldn't only—if you had facial hair, it had to be only a mustache. The—your—you could not grow your hair past your ears on your collars. It was no issue with me because, you know, I—I'm balding so I like short hair and I can't really grow that much facial hair, so.

But the—the requirement of wearing suits and ties was just—it—it was very restrictive, and it was exposing us to the general public, just—not all the time because sometimes we would be in—we would be in first class on a Monday morning on a—on a flight from one coast to the other, and it was common sense to be in some from of—of business attire.

But when things got ridiculous, such as making us wear suits and ties on a Southwest Airlines flight, which is—it didn't have any classes on a weekend and everybody's boarding the plane in jeans and polos, and we were boarded in—we were dressed and exposing ourselves.

And also the check point—the check point bypassing procedures at the airports, we had to walk up the exit lanes. We were constantly being—being flagged. If any—if anybody with any common sense wanted to figure out who we were, just some elementary surveillance would have figured us out.

Q. So what is the connection between when you say this—these types of issues and what happened in July of 2003 [80] concerning this disclosure?

A. Well, the Agency said they believed that we were a high deterrent. If everybody—if people knew that—if the terrorists, potential terrorists, knew we were going to be on a flight, they would remove themselves from the flight and not—and not carry out their operation.

So in July—sometime between July 26th and—of '03 and July 28th, we received a message that we had to come into the office immediately. It didn't matter what our duty status was. There was an emergency one-on-one briefing that we had to get.

And we could not—they could not transmit the briefing to us via email or discuss it with—with us over our—over the phone.

So we had to physically walk into the field office and receive a—this one-on-one mandatory suicide hijacking brief-

ing. And I remember I received mine from a gentleman by the name of Nathan Salazar. He was the—he was one of the several people that were assigned to the office.

And there was a master—there was another master folder where you—you reviewed what the threat was. Then you signed off on the roster.

And we brought the exhibit today. It's—

Q. I understand that. But what—what was the purpose of the meeting?

[81]

A. They told us that there was a serious potential of a plot for hijackers to avoid immigration visa screening, fly into the United States from a foreign country into an airport that didn't require them to be screened. And that way they were going to smuggle weapons in camera equipment or children's toys through foreign security and get it into—into an airport where you didn't have security.

For instance, you have—you have Dulles Airport, which just has one giant central screen. If you—at one point, if you flew in from a foreign country and you had been screened already, you did not go through U.S. screen. And that was something they were going to exploit.

That wouldn't be the case, for—for instance, at an airport such as Dallas-Fort Worth where there is zillions of checkpoints—not zillions—but dozens of checkpoints between each terminal.

So, you know, better—but for the ones that had one central screening area, they were going to bypass that.

They were going to get the weapons on the plane and overpower the crew or the Air Marshals and fly, fly the—fly the planes into East Coast targets—

Q. Okay.

A. —and then there were other European targets.

Q. And you understand that was some sort of an alert to heighten the vigilance of the Air Marshals or . . . ?

[82]

A. It was an emergency. It was unprecedented, and it never happened afterwards. We never were mandated a one-on-one security briefing.

Q. Okay. And, by the way, this briefing was not—there was no—none of the content of this briefing was provided to you on your cell phone, right?

A. No. The—the—the written warning was marked as sensitive security information. I attempted to FOIA it for several years. And the old administration had it completely blank.

And then r ıtly the—I reFOIAed—if there's such a term. The gave me the—the threat briefing in its entirety.

Q. So what happened after you received this threat brief?

A. That—about—within sometime between when we got the briefing, which was the 26th and the 28th, everybody in the country had received a text message to the Nokia phones, not to the—not to the—and the brand was—I'm

sorry—it was a Palm Tungsten W PDA. We got this message on our Nokia phones.

And the message simply stated that all overnight missions were going to be canceled—no—and you needed to can- —you needed to cancel your hotel reservations and call the office to get new schedules.

Q. Okay. Now do you have any recollection as to whether the text had any associated markings labeling the information as [83] sensitive, or anything like that?

A. No. There was no SSI markings on the—on the message sent to the Nokias.

Q. And when you received this message on the cell phone, did you understand the information to be SSI information?

A. No.

Q. Why not?

A. It—not only—it was—not only it didn't have any markings, SSI markings, not even a warning that this—don't disseminate this or—it had—it had nothing on there. It was just a—it was just a plain message. That and the fact that it was sent to the Nokias and not to the—to the Palm PDAs.

Q. Why was it significant to you that it's sent to the Nokias and not to Palm PDA?

A. The PDA had—had encryption software and a—and a password to—to open up to operate it.

Q. So what happened next, after you got this text message?

A. I called some Air Marshals around the country that I knew and asked them, "Did you get—did you get some message?"

And pretty much got something that I did: Cancel your hotel reservations to avoid cancellation fees and—and call the office for new schedules.

And I—after that I had made—I made a phone call to the office and spoke with a supervisor and asked him what —[84] what is going on.

And he said pretty plainly that there was a Headquarters' decision to save money on hotel costs because there was no more money in the budget.

Q. Okay. And did you have a concern with that?

A. Yeah. Right after—we had just gotten the—this suicide hijacking alert that was issued. And we were getting these one-on-one emergency briefings, and the Agency was —was pretty much advertising which planes that we were —we were on.

I thought it was—I thought the—everything—I thought it was a mistake. I didn't believe it was—could possibly make such a decision to—to be removing Air Marshals from the flights that the law mandated.

Q. When you say the Agency was basically advertising which flights you were on, what do you mean by that?

A. When the—when they gave us the—the dress code policy and grooming standards and not—just not—at one time we were covertly boarding aircraft.

And—but the airlines said that they just—they didn't want to—they didn't have the manpower to help us to get on the plane without having all of the passengers know who we were.

So it was—it was becoming—we were—and people were trying—submitting memos suggesting ways that Air [85] Marshals could board without letting everybody know their identities.

Q. So what happened next?

A. I—after speaking with the supervisor, I—I don't remember exactly what our conversation was. I—I know we didn't—he didn't tell me if it was—this information was SSI or had any classification. But he said, he goes, "There's nothing we could do here at the field—this is not a field-office-level decision. This is a Headquarters' decision that's affecting all—every field office in the country."

And I—I hung up. Pretty much—I just struggled with it. You know, I was just—we were constantly—it just got to the point, you know, I—I follow orders, and I don't make the rules. In my—I've always been a journeyman employee.

One day I'm told to pick up the green rocks; the other day I'm told to pick up the red rocks. On this day it seemed like they wanted us to take the rocks and throw them at the kids. It just seemed that the—the Agency had—had either lost control or was just making a grave mistake. And I decided, well, I'll try the OIG.

I always thought—I mean every telephone I ever picked up while in government service had the OIG sticker

and every wall said if there's—if there is a violation of law, you call—you call the OIG. So I did that.

[86]

I called the Department of Homeland Security Office of Inspector General Hotline and spoke to a operator. And they asked me where I was located.

And I was kind of vague. I said I'm in southern Nevada. And said she, "Okay, call—here's the phone number for the San Diego office."

So I made a phone call to the San Diego Field Office. And they said, "We just do—we just do audits here. You need to speak to a Criminal—Criminal Investigative Division and the closest one here is the Oakland Field Office."

And I called the Oakland Field Office. And that's when I spoke to a Special Agent about—I don't know if I—I didn't immediately speak to a Special Agent. I probably spoke to a receptionist first, and I said, "I'd like to speak to a criminal investigator."

I spoke to him. I told him what's going on. He said he was very aware of all the problems at the Air Marshals. He said, he goes, "I fly, and it's pretty obvious who you guys are. Some people like to play who's the Air Marshal on their flight." He was kind of making a big joke out of it. And he's just—and he—I said, "Well, what—what could be done here? Can there"—

And he goes, "Uh, this is—this is—there's nothing that could be done. Just—just walk away from it, don't—don't bother. You know, you got a lot of years left in your [87] career." I think we had a discussion. Even—we even

talked about his old agency. He was—he had just recently became an OIG agent with the DHS, because he was an OIG agent with the—with FEMA. So he was really new to a lot of that.

And so it looked like it wasn't going anywhere. And after I hung up, I kind of stewed on this thing. And I decided to make a phone call to a reporter that had been doing some good reporting on—on TSA. I thought he wrote—wrote some very responsible articles.

I—I remember I liked—a lot of even—even the field office people liked this guy because the way he wrote his articles he was not trying to endanger the public but trying to—trying to make people aware. And that—so I spoke to him. And I told him what happened. And—

Q. What did you do—okay. What did you tell him?

A. I told him that there—there was a plan to remove Air Marshals off of all long-distance flights, and this was right after we just got our—our suicide hijacking briefings.

Q. Okay.

A. And he was aware—he was aware of the—the briefings.

Q. Now when you made that statement to him, did you understand that what you were telling him was SSI-protected?

A. No.

Q. Why not?

A. Well, the message, once again, was sent to me without any [88] marking to the Nokia instead of the—the Palm PDA. And the—you know, when I spoke to the supervisor, he said this was a—he just said this thing was kind of crazy, nuts. He—he was even—the supervisor, he—he seemed kind of like a—he knew that the Agency was just kind of running things into the ground, too. So he kind of saw it as a joke.

It seemed like everybody—we had—it seemed like nobody was—the guys who were—were most concerned with —with what was going on with Air Marshal operations were the guys that were flying the flights.

But the officials, the supervisors that were inside the field offices and not flying missions, such as my supervisor and the OIG agent, they just kind of thought it was funny. You know, it was just—because it was—it was always in the paper. And it was just—it—and it was just obvious to anybody who traveled who the Air Marshals were. I didn't think it was that funny. I thought—I thought it was very serious.

And one thing they did teach us in the—in the Academy: This was a law. Well, this law—the law was passed for Air Marshals to be on these—these flights such as were targeted on 9/11.

Q. Okay. Now did you understand the communications on your Nokia cell phone, whether by voice or by text, to be protected information?

[89]

A. Well, it—I—I know the system that they used. I remember operations, when they sent these text messages. And what it was, was it was the phone number, it was the nine-digit phone number, then the server. So what they did was collected everybody's phone number and blasted it out. So—

Q. Blasted out there to the world—

A. Yeah. It was sort of like somebody running into a plaza and taking a bullhorn and blasting it out. And even —even the recipient, you couldn't even guarantee—let's say an Air Marshal had changed his phone number, or he had left and that phone number was reassigned to somebody in the AT&T network who wasn't an Air Marshal. They were getting that message, too.

So anybody could have gotten this message, given the—the system. I believe now because of—you get charged for text messages and everything else, you just can't email a text message like the Agency did with—with the nine-digit number or the server. I think it was—for instance, if my phone number in Nevada was 702-212-5555, it would be "@Mobile.AT&T.net."

Q. So anybody who happened to be in possession or in custody of that Nokia phone would have been able to consume or read the message?

A. Yes.

MR. BERGER: Now, Your Honor, can we hold for just [90] one moment so I can just confer with my co-counsel?

JUDGE KANG: Yes. Go ahead, Mr. Berger.

(Appellant counsel confer off the record.)

BY MR. BERGER:

Q. Now at the time that you spoke to the reporter did you believe that you were violating some law?

A. No, I did not.

Q. Why not?

A. Because there was—I believe there was a—there was —there was danger going on, not just to Air Marshals but the general public. And the information, I believe, was— may have been potentially harmful had this plan ever gone into effect. I didn't think it was illegal, but I thought that what was happening was illegal and dangerous to the—to the public.

Q. Now prior to this disclosure or at any time after this disclosure had you ever disclosed any information to an unauthorized recipient that was marked as SSI?

A. No, absolutely not.

Q. And has anyone ever accused you of disclosing any information to an unauthorized recipient that was marked SSI?

A. Not until this proposal to have me fired.

Q. And in this case there was no marking for SSI, correct?

A. That's correct.

Q. Now after you spoke to the reporter, do you have any [91] recollection of what the Agency's response was to this?

A. Yeah. It was—it was pretty surreal, what was happening—

MS. CALAGUAS: Objection, that question is vague.

JUDGE KANG: Stand by.

MS. CALAGUAS: I'm sorry. Objection, that question is vague. Use of the word "this," I'm not sure what that's referring to.

MR. BERGER: That's referring to the disclosure.

JUDGE KANG: Okay. Mr. Berger, please just go ahead and restate your question again—

MR. BERGER: Yeah.

JUDGE KANG: —for clarity.

MR. BERGER: Yeah.

BY MR. BERGER:

Q. Yeah. After you made the disclosure did you become aware of an Agency response?

A. Yes. It was—

Q. What happened?

A. It was—it was just—oh, it was all over the TV. I was —I was watching the Secretary. He was going on to explain what—what it was. He said it was a mistake, and it —I'll never forget seeing the president on—in the—in the front of the White House when he was—he was asked about it by reporters.

[92]

Q. Now you said the Secretary said it was a mistake?

A. Yes.

Q. And was the mistake corrected by the Agency?

A. Yes. The plan never went into effect. I also remember the—the press conference with Senator Hillary Clinton, Senator Barbara Boxer, Senator Frank Launtenberg, and Senator John Kerry were just ripping our Agency for it. And it was—it was on—it was very uncomfortable because I had a lot of pride in the Agency and I—it looked like that—being the source of that disclosure was having my Agency getting—getting severely criticized.

And I didn't—I had a lot of pride and I didn't like watching that unfold all over television.

Q. All right. Now after the disclosure of this information, did there come a time when you became the subject of an investigation by the Agency?

A. Yes.

Q. And how—how much time lapsed between the disclosure and the time you became aware that you were under investigation?

A. Well, I pretty—I felt pretty ashamed of having to do this anonymously. And I figured—I figured the best way to start addressing these problems was in a collective voice. And that's when I formed—I was the cofounder for the Federal Law Enforcement Officers Association. And that's where things started getting very hectic. I—

[93]

Q. Well, okay. So after the disclosure did you become aware that there was an investigation at some point, whenever it was?

A. Yes.

Q. How long after the disclosure was there an investigation?

A. Approximately 13—13 months.

Q. Okay. And—

A. I'm sorry. That's—that's incorrect. I had no—it would have been—it would have been approximately 23 months, 22 months when I knew there—I was under investigation for the—for the SSI disclosure.

Q. Okay. And when you first became aware of the investigation, was it for the SSI issue or were there other issues that you—that were involved?

A. Well, the investigation initially was started because of my appearance on "NBC Nightly News with Tom Brokaw."

And I was told by a supervisor in the field office that the Special Agent in Charge has begun an investigation to find out who was the Air Marshal on that program.

Q. Okay. And how soon after your appearance on that program that you became aware that you were the subject of an investigation?

A. Within days.

Q. Okay. And what did you understand the scope and the issues in that investigation were, initially?

[94]

A. They just wanted to know who was—it—it was—it was impossible any sensitive security information or classified information was divulged during my interview, so—

Q. With Mr. Brokaw?

A. That's correct.

Q. Okay.

A. It was just who find—just to find out who was—who was on the program.

Q. Okay. And during the course of that investigation did there come a time when you informed the investigators that you—you had disclosed this information that the Agency considers to be SSI?

A. Yes. Approximately seven months later in May of—early May, the Of- —the Immigration and Customs Enforcement, Office of Professional Responsibility, ICE OPR, the investigators came in and gave me a pep talk, saying, "Be completely and fully forward here. You do not want to lie to us,"—

Q. Um-hum.

A. —"because we will find out. So you need to tell us everything."

Q. And they asked you about that?

A. They asked me if I was the person, and I said yes.

Q. Um-hum.

A. And they go, "Well, why—why—why did he approach you and what other information did he [sic] give to them" and—

[95]

Q. Okay. And prior to the investigation you said that you were *involved in helping to organize* a local chapter of FLEOA?

A. Yes. That was—

Q. Just—just describe what your activity was.

A. Yeah. About two to three weeks af- —I'd say about—about a month after I made my July 2003 disclosure, I began to organize the—and I cofounded the Federal Air Marshal Service Chapter within the Federal Law Enforcement Officers Association.

And we started communicating with Special Agents on the National Board. And they all concurred. They already—they already knew what we knew. And they were onboard with us immediately and started trying—attempting to correspond with Director Thomas Quinn.

And he re- —he ignored us and started referring to us in pretty disparaging terms. And that's when the Federal —the FLEOA and National Board started communicating to the media. And it—it just got—it just—it became a real —it got really feisty.

And we—the National Board went so far as to issue a no-confidence vote in Director Thomas Quinn. And eventually a week—less—a few days after that no-confidence vote happened, that's when Frank Donzanti sent the—his

supervisors to the house of Frank Terreri and striped him of his weapon and his badge in front of his—his neighbors and [96] his—his family.

And when he—when they exonerated him, they left him —the ICE OPR exonerated him. And for six weeks he was still left at home, wondering if he was going to be arrested or—or fired. That was kind of what was going on. And we just—all we wanted was to make a collective voice so we were heard. And eventually things eventually started to change, get—get better.

Let me expand. There was also—we had also other vice presidents that were targeted to—

MS. CALAGUAS: Objection, there's no—

JUDGE KANG: That's fine—

MR. BERGER: That's okay.

MS. CALAGUAS: There's no question pending.

THE WITNESS: I'm sorry. I couldn't—

BY MR. BERGER:

Q. Yeah. Did you—did you have a subjective belief that you were targeted by your management because of your FLEOA activities?

A. Yes.

Q. Why?

A. After—after what—after what was happ- —happened to Frank, there was so much media exposure on Frank, that he—he be- —Frank Terreri, that after he was exonerated, pretty much after they went after the number—

number-two guy. And I [97] believe that's when I was—I became a hot target for—by Headquarters.

(Appellant's counsel confer off the record.)

BY MR. BERGER:

Q. Did you—at the time that you spoke to the reporter, did you believe that you were a whistleblower?

A. I—to be honest with you,—

MS. CALAGUAS: Objection, this—

THE WITNESS: —I never really understood the—

MS. CALAGUAS: Objection. This question is irrelevant and outside the scope of this proceeding at this point.

JUDGE KANG: Overruled. Repeat the question.

MR. BERGER: Yeah.

BY MR. BERGER:

Q. Did you believe that you were a whistleblower? You were answering the question.

A. At the time I didn't even understand the term, never did.

Q. Okay.

A. Never—I never read the whistleblower law, didn't understand the role. This is some—everything I eventually learned, the role of the Office of Special Counsel, I was —I was just a grunt, you know. You do the right—got a badge and gun, and I took an oath, and I just did what was

right and what was legal and prevented things that were illegal.

[98]

MR. BERGER: Okay. I don't have any further questions.

JUDGE KANG: Mr. MacLean, are you okay to continue on with the cross, or do you need a break?

THE WITNESS: I'm fine.

MR. BERGER: You're fine? Okay. Well, can we take a two-minute—

THE WITNESS: It's up to—if—

MR. BERGER: Can we take a two-minute—

THE WITNESS: I—I don't mind if other people break. I'm fine now.

MS. CALAGUAS: I need at least a quick five-minute break.

JUDGE KANG: Ms. Calaguas is requesting a five-minute break, so let's go on break. We'll reconvene in five. We're off the record. (Recess taken from 11:19 a.m. to 11:31 a.m.)

JUDGE KANG: Okay. We took somewhat of a longer break than I had anticipated. While we were off the record the Agency expressed an interest and requested to press on with their combined cross- and direct examination of the Appellant rather than taking a break at this point, and Mr. Berger concurred with that request. So we're going to continue on.

Because the Appellant is a mutually-requested and [99] approved witness, please—I'm going to give you broader latitude, Ms. Calaguas, in terms of having a combined direct and cross-examination. You don't have to break it up in to doing your cross and then coming back on direct. I am asking you to do both right now. Okay.

MS. CALAGUAS: Thank you, Your Honor.

JUDGE KANG: And, Mr. MacLean, you are reminded that you remain under oath.

THE WITNESS: Yes, sir.

JUDGE KANG: Okay. The witness is yours, Agency.

CROSS-EXAMINATION/DIRECT EXAMINATION

BY MS. CALAGUAS:

Q. Good afternoon, Mr. MacLean. We meet again. Again my name is Eileen Calaguas, and I'm the Agency representative. It's been a couple years since we last saw each other, but I have a couple of—maybe more than a couple of questions for you this afternoon, just to clarify your testimony earlier when your counsel was asking you questions. Can you hear me all right, Mr. MacLean?

A. Perfectly.

Q. Okay. Great.

Really quickly, I'm just going to have you take a look at a couple of Agency hearing exhibits. And that would be 5, 6, and 7. If you could take a look at them and just verify

that that's your signature that appears on each of [100] those exhibits?

MS. BOOK: Did you want to look at the—

MR. BERGER: Yes.

MS. BOOK:—exhibits that were mentioned?

MR. BERGER: Yes. Thank you. 5, you said 5, 6, and 7?

MS. CALAGUAS: 5, 6, and 7.

MS. BOOK: (Indecipherable) come down here.

MR. BERGER: Oh, oh. Should I bring them up there?

MS. BOOK: I thought you wanted to preview them. I'll take them up.

MR. BERGER: Okay. Hold on.

MS. BOOK: Okay?

MR. BERGER: Yeah. Okay.

MS. BOOK: Your Honor, may I approach the bench?

JUDGE KANG: Yes. Yes.

MS. BOOK: Thank you.

JUDGE KANG: And thank you for helping, Ms. Book, with this.

MS. BOOK: Sure. No problem.

(Counsel in Washington, D.C. conferring off the record.)

MS. BOOK: Just 5, 6, and 7; is that correct?

MS. CALAGUAS: Yes.

MS. BOOK: Okay.

BY MS. CALAGUAS:

[101]

Q. Mr. MacLean, do you have those exhibits in front of you?

A. Yes, ma'am.

Q. And if you could verify on each of the exhibits that it's your signature that appears, probably towards the end of each exhibit?

A. Yes. Those are all my signatures.

Q. Okay. Thank you for that, Mr. MacLean.

So you've been a Federal Air Marshal since October of 2001, correct?

A. October—which—

Q. October of 2001.

A. —what was it again?

Q. Approximate- —

A. Yes, ma'am.

Q. Approximately. And you testified that you—you applied to become a Federal Air Marshal; isn't that right?

A. Yes, ma'am.

Q. Okay. And the vacancy announcement that you responded to, there was a specific provision in that vacancy announcement that put you on notice that you could be

removed for releasing sensitive security information; isn't that right?

A. I'm not s- —is the announcement here?

MR. BERGER: She's just asking—

MS. CALAGUAS: You were—

MR. BERGER: —you a question. Do you know—

[102]

THE WITNESS: I don't remember if it was—I don't remember exactly who was—if it said "SSI" or "sensitive information."

BY MS. CALAGUAS:

Q. But you recall that the vacancy announcement did speak to the disclosure of some type of sensitive information, that that could be a basis for your removal as a Federal Air Marshal; isn't that right?

A. Yes, ma'am.

Q. And you recall—

A. Yes, ma'am.

Q. —you recall reading that at the time that you applied for the Federal Air Marshal position?

A. I don't really recall, but I'm sure I read it.

Q. The Federal Air Marshal position, that's a law enforcement one; isn't that right?

A. Yes, ma'am.

Q. But it's not the first law enforcement position that you've held; isn't that right?

A. That's correct.

Q. Okay. At the time that you became a Federal Air Marshal you also signed an acknowledgement about the conditions of your employment as a FAM; isn't that right?

A. Yes, ma'am.

Q. And one of those conditions, again, was that you could be [103] removed for disclosing the unauthorized release of sensitive security information; isn't that right?

A. Yes, ma'am.

Q. You testified earlier about the training that you've received regarding sensitive security information. You—you actually received a copy of the Agency's policy on sensitive security information prior to the time that you made your disclosure to Mr. Meeks; isn't that right?

A. I'm sure I did.

Q. But you decided not to read that policy line for line; is that your testimony?

A. Yes, ma'am.

Q. Okay. You had an obligation to review the entire contents of that policy; isn't that right?

A. Yes, ma'am.

Q. But you chose not to even read the policy line by line; isn't that right?

MR. BERGER: Well, you're assuming—Your Honor, it's been—it's been asked and answer—answered, but I don't even know what policy the counsel's referring to.

MS. CALAGUAS: Well, Mr. MacLean seems to understand the policy that I'm referring to.

JUDGE KANG: Let's back up, Ms. Calaguas. And why don't you go ahead and clarify what—you know, back up with your questioning. I understand you and Mr. MacLean realize [104] what policy you folks are discussing, but I think it's a valid objection to back up a bit and identify the policy for the record.

BY MS. CALAGUAS:

Q. Okay. So that we're clear, I'm asking you questions about the Agency's policy regarding sensitive security information.

Do you—you recall that policy; isn't that right, Mr. MacLean?

A. I signed a statement acknowledging that I—I attended a SSI training and read the—read the policy.

Q. But, in fact, you didn't actually read that policy in it's entirety; isn't that your testimony today?

A. I'd rather say I didn't read and commit to memory every single line on—throughout the policy, —

Q. But you had—

A. —but—

Q. I'm sorry to interrupt.

A. But the training, the summar- —it was summarized to us, the points of it, but not every single point was—was—did I read every single line and commit it to memory. And it was—it was summarized. It was—common-sense issues were told to us what is SSI. And our—our job was—our mission was very—was very one dimensional: We flew planes. So flight numbers was SSI. Seating assignments.

Q. Just to carry that thought then, FAM scheduling, that was [105] SSI. You had that understanding; isn't that right?

A. If it had the flight numbers and times, yes, ma'am.

Q. So is your testimony today that—well, let me ask you this.

In terms of scheduling, if a Federal Air Marshal wasn't on a plane and wasn't scheduled to be on the plane, you would agree that the Federal Air Marshal's absence on the plane is part of scheduling; isn't that right?

A. If—if a FAM is not scheduled to be on a plane, that's scheduling?

Q. Yes. Do you agree with that?

A. It's—it's really unclear to me. Do you mean that if I told people that there were no Air Marshals—

JUDGE KANG: Mr. MacLean,—

THE WITNESS: —on a flight—

JUDGE KANG: Mr. MacLean, please refrain from asking questions of counsel. If you—

MS. CALAGUAS: It's probably a very poorly-worded question, so I apologize for that. Let me withdraw that question and ask another question.

JUDGE KANG: Okay. Go ahead, Ms. Calaguas.

And I'm not asking you not to ask questions. Just perhaps reword it since the witness doesn't understand it.

MS. CALAGUAS: Yes, I understand. Thank you, Your Honor.

[106]

BY MS. CALAGUAS:

Q. Let's go back to what you were talking about in terms of the SSI training that you received.

You recall that it was a common-sense approach to the discussion of SSI; isn't that right?

A. Yeah. The training was done in sort of hypothetical situations. If—if you needed somebody to pick you up from the airport, you—you had them wait for you in the baggage claim. You do not tell them the flight number that you were arriving on, or did you tell them origins, destinations of—of a particular flight because the big issue there was a lot of Air Marshals had gotten into a lot of hot water for telling people the flight numbers and the flight times of certain plane flying that—that they were going to come into.

Q. And you would agree that the reason that that type of information needed to be safeguarded was as a Federal Air

Marshal you didn't want to broadcast whether or not you were on a particular flight; isn't that right?

A. Yeah. If you told your—your wife or your significant other that you were going to be on a specific flight, you ran the risk of him or her gossiping and telling the wrong people that you and your fellow Air Marshals are going to be on that—on that flight.

Q. And so you understood that that type of information was not something that you could share even—even with your wife, [107] or your girlfriend, or someone—

A. Yeah. The flight—

Q. —or someone—

A. —number that you're going to be—the arriving flight that you're going to be on, that's correct, or even the departing flight, because some—some wives even wanted to —and spouses, I should say, because there's females FAMs too, I'm sorry—some wanted to monitor the flights on the internet as to their arrival times. So it was very, very clear that you did not tell flight numbers and times of the flights you flew missions on.

Q. Because you were not supposed to disclose if you were on a particular flight; isn't that right?

A. Yes. The—the flight number that you're on or—

Q. Okay. I heard your answer. Thank you for that, Mr. MacLean.

And you talked earlier in your testimony about how it was a deterrent that if it was known that a particular—that

a Federal Air Marshal was present on a flight, that that served as a deterrent to the terrorist; isn't that right?

A. That was the—that was the Director's unwritten policy.

Q. But you would—you with on agree that if a terrorist was aware that a particular flight had a Federal Air Marshal on it, that that would be a deterrent for that terrorist to attack at that time; isn't that right?

[108]

A. I disagree.

Q. You don't agree with that?

A. That's correct.

Q. You would agree, though, that if a terrorist was aware that that particular flight didn't have a Federal Air Marshal that that would actually be an invitation to strike at that moment; isn't that right?

A. If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific flight.

Q. Let's talk about the text message then that you shared with Brock Meeks. You purposely sought out this news reporter when you disclosed the information to him; isn't that right?

A. Yes, ma'am.

Q. Okay. And you did so because you knew that he would —he would broadcast the information that you were giving him; isn't that right?

A. He said he was in communication with key members of Congress. They were going to have the—the plan reversed before it went into effect six days later.

Q. Well, you knew he worked for MSNBC; isn't that right?

A. Yes, ma'am.

Q. So you knew that his job was to report to the public; isn't that right?

A. Yes, ma'am.

[109]

Q. And not just to members of—

A. Yes.

Q. —Congress?

A. Yes, ma'am.

Q. And, in fact, by—

A. I—

Q. In fact, by disclosing the information to that particular journalist, it was your intent that he disseminate the information that you gave him; isn't that right?

A. I had no idea what he was going to—his intention. I knew his intention, what he was—what he was going to actually do with the story, if it was going to become a story, or if Congress was going to move before even a story was published.

So he never made any promising, definitive actual statement stating that this was going to be headline news tomorrow.

Q. But you—you didn't expect Mr. Meeks to keep the information that you gave him confidential; isn't that right?

A. He was communicating—he was communicating it with his—with the members of Congress that protested the following morning.

Q. But you knew he was going to keep the information confidential?

A. There was—yeah, I believe there was—there was a very [110] good possibility that he would have made it public.

Q. In fact,—

A. But we had an agreement—

Q. I'm sorry. I'm cutting you off.

A. We had an agreement—I had an agreement with the reporter that he was going to do this as responsible as possible.

Q. And that would mean that he was going to publicize the information that you gave him; isn't that right?

A. He was communicating first with—with members of Congress. Before he would—before he issued the—the report, he was in communication with offices of Congress.

And he told me that this was going to be immediately—be addressed in the morning. Whether it was a public press conference, which eventually it was, I—I didn't even know that. I didn't know the story was going to be as big as it was.

Q. But it was your intent and expectation that he—that Mr. Meeks, as a news reporter, was going to publicize the information that you gave him; isn't that right?

A. Yes, so that the plan would never go into effect.

Q. And when you gave this information to Mr. Meeks you were aware that he wasn't—he wasn't authorized to receive this information; isn't that right?

A. No. I don't—I didn't know what—what was the sensitivity of the information. All I knew is that the plan [111] had a potential of being—of being dangerous and was illegal.

Q. And the information that you gave Mr. Meeks was that you told him that RON missions up to August 9th would be canceled; isn't that right?

A. I'm not sure of the exact dates. What I'm sure of is that a message was sent to me, to my—to my Nokia phone that RON missions would—RON missions were being canceled and that we needed to cancel our hotel reservations and call the operations desk to get new schedules.

Q. Can you tell—

A. The exact dates—

MR. BERGER: Oh, he's not finished yet, Ms. Calaguas.

MS. CALAGUAS: Yeah. I'm sorry.

THE WITNESS: But exact dates—exact dates, I'm not—I don't know if I was—if in my testimony I used the article as a reference.

BY MS. CALAGUAS:

Q. When you say "testimony," you're referring to the information that you provided to the investigator?

A. That and probably in the deposition with you in 2006.

Q. But—

A. I'm not certain, though.

Q. It—it—

A. I'm not certain.

Q. That's fine.

[112]

But it's clear in your mind today that when you informed Mr. Meeks that RON missions would be canceled, that that was prior to any cancellation of missions; isn't that right?

A. Could you please—can you please rephrase it?

Q. You didn't understand my question?

A. No, ma'am. I'm sorry.

Q. Okay. So at the time that you told Mr. Meeks that RON missions would be canceled, that was prior to the cancellation of any missions; isn't that right?

A. Yes. No missions were being canceled imminently. It was—it was supposed to happen days later. The—the Instructor General Report stated that the Director said it was to begin on August 3rd. But I believe the article said August 1st.

Q. Just give me a second to look at my notes, Mr. MacLean.

A. Yes, ma'am.

Q. You testified earlier that you spoke to a supervisor at some point after receiving this text message on your cell phone; isn't that right?

A. Yes, after speaking to other FAMs that I knew around the country.

Q. Okay. And in speaking with that supervisor you never asked him if the information on the text message was, in fact, sensitive secured information, did you?

A. I—I don't—that was a long time ago. I don't remember, [113] but I'm pretty certain that I would not have such a conversation with him. That was not even the topic. The—the dialogue that we had was pretty jovial. He was just kind of—it was—he made it a joke about what was happening.

Q. And you didn't ask that supervisor or any other supervisor if you could disclose this information to a news reporter; isn't that right?

A. No, I didn't ask to have permission.

Q. At the time that you disclosed the information to the news reporter, it didn't matter to you what the nature of the information that you were disclosing was, did it? It didn't matter to you that it was—

A. I believe—

Q. —sensitive security information or any other type of protected information; isn't that right?

A. That's what I said—that's what I said in my deposition, but I was speculating with—with the—with the scenarios that you were giving me. I'm just speculating that—when you asked me that question.

It matters to me that—I don't believe that breaking—breaking the law to prevent law being broken is—is justified. I didn't believe I was breaking the law at the time.

Q. You had an opportunity to respond to the proposal to remove you as a Federal Air Marshal; isn't that right?

[114]

A. Yes, ma'am.

Q. And it was important to you to have that opportunity to respond; isn't that right?

A. Yes, ma'am.

Q. You wouldn't have wanted the Agency to take any actions against you without giving you an opportunity to respond; isn't that right?

A. Yes, ma'am. But they already had taken—

Q. And—and in responding or—in responding to the proposed removal, you didn't express any regret or remorse for having made the disclosure that you did, did you?

A. That's what I said in my testimony, but it doesn't mean I have remorse for this day.

Q. Are you saying today that you're remorseful?

A. I have a lot of regret and remorse of what I put my—of what this has put my family through. I didn't realize my actions were going—were going to have these consequences years later.

Q. But at the time—

A. So—

Q. But that's today, and it wasn't at that time that you—when you had the opportunity to respond directly to Mr. Donzanti; isn't that right?

A. I believed there was—there was a violation of law and a danger to—to public safety and national security at the [115] time.

Q. So at the time you didn't have any regrets?

A. No, ma'am, I didn't have any regrets when you—when —when you deposed me or the investigators spoke to me about my disclosure.

Q. And you didn't have any regrets even when you were being interviewed by other newspaper agencies on whether you would have made the disclosure again; isn't that right?

A. If I saved—if I saved a plane from falling out of the sky or saved a life, I believe I did my job, and I shouldn't regret it. But I do regret of—what this has happened to me personally and also the Agency.

I believe the Agency lost a lot of credibility and had its reputation tarnished. And no matter what, I still identify myself as a Federal Air Marshal. So I take a lot of pride in that. So I do regret that the Agency was—did—was

tarnished for—for the—for the plan and how it got exposed.

Q. Okay. So you say that the Agency's reputation has been tarnished by your disclosure. Do you recognize, however, that in disclosing that information that you caused a harm to the public by broadcasting to the terrorists exactly when to do their attacks? Do you see that?

A. No, that's not possible because it's pretty—it's pretty—it's disingenuous to say that, that for two entire months this information would not have gotten out there.

[116]

Just like in the Anthony Ryan case in July—in August of '06, the—the Agency was not able to deploy Air Marshals for eight days or longer on—on the flights after the liquid IED plots in the United Kingdom.

So afterwards I believe that eventually this—this information would have been recklessly released. And while the plan had gone in operation, there would have been a danger. But since the plan got reversed six days in advance, there was no danger to those flights.

Q. Well, in fact, we didn't have to wait two months because you recklessly released it; isn't that right?

A. No, ma'am.

Q. Isn't—isn't it, in fact, true that at one point you were dis- —you were accusing FAMS' management of disclosing SSI themselves?

A. Yes, ma'am.

Q. In—in—so you had an understanding of what SSI was; isn't that right?

A. Yes, ma'am.

Q. You testified earlier about Frank Terreri. As far as you know he never disclosed sensitive security information to an authorized—an unauthorized person; isn't that right?

A. I believe he was brought up on charges of release of sensitive information also.

Q. Did you—you never saw any proposal to discipline him for [117] disclosing SSI; isn't that right?

A. Can I correct to say that I didn't mean charges. I meant he was investigated for releasing sensitive security information. And he provided me a copy of his ICE OPR Report of Investigation, the one where I referenced the—the supervisors were sent to his house—

Q. Okay.

A. —to take his gun away.

Q. So you talked about an investigation and you—an investigation on Mr. Terreri. And your testimony is that that investigation determined the charges were unfounded; isn't that right?

A. Yes, ma'am.

Q. So as far as you know Mr. Terreri never disclosed sensitive security information to an unauthorized person; isn't that right?

A. That's correct.

Q. And he still works for the Agency today; isn't that right?

A. Yes, ma'am.

MS. CALAGUAS: Just give me a second, Your Honor.

JUDGE KANG: Okay.

(Agency counsel confer off the record.)

BY MS. CALAGUAS:

Q. You recall the deposition that you took in this case; isn't that right?

[118]

A. Yes, ma'am.

Q. And it was during that deposition that you explained to me that you would have made this disclosure even if the information was classified; isn't that right?

A. I believe I answered that earlier. And my answer was I don't believe I was breaking the law. And I would never break the law to enforce the law.

Q. But you believed—

A. I—

Q. Am I interrupting you?

A. I was speculating—I was speculating, ma'am.

Q. But you believed that even if the information was classified, that that would be something you would still disclose; isn't that right?

A. Releasing classified information would have been illegal, and it would have—it—making just—just to enforce the law, you should not be breaking the law and disclosing classified information is breaking the law. I don't believe I broke the law.

I believe that I—I think that was still a hypothetical scenario and a speculative question you gave me.

Q. Well, do you recall me asking you the question—let me ask you this.

When you were discussing with your supervisor the cancellation of the RON missions, you—your testimony is that [119] you didn't understand the nature of that—of that information; you didn't understand that it was SSI; isn't that right?

A. No, I didn't perceive it to be SSI.

Q. And, in fact, it didn't matter to you, did it, that it was SSI?

A. It would matter to me because disclosing SSI is—would endanger my life or other people's life. It would matter. But the message came to me without a label and in an unsecure means. If the information was SSI, it—it should have come to our PDA and not our Nokias. So I never believed that the information was SSI.

Q. Okay. When I asked you the question, "In discussing the cancellation of RON missions with Mr. Schofield"—Mr. Schofield is your supervisor at the time, right?

A. I don't believe he ever was my rating supervisor, but I'm not sure of that. At the time he was not my rating supervisor.

Q. I asked you, "Did you know whether or not you were discussing sensitive security information?"

And you answered—

A. That's correct.

Q. And you answered, "It did not matter." Isn't that right?

A. In my deposition, ma'am?

Q. Yes.

[120]

A. If that's—that's what—that's what I said in my deposition, I—that's what I said, but I—I believe it was taken out of context.

Q. Okay. And then after that I asked you—

A. I do—

Q. Then after that I asked you the following question, "Why didn't it matter?" Do you recall that question?

A. Yes.

Q. And in response to that question—

A. Did your—you—

Q. And in—

A. Well, can you—can you—

MR. BERGER: Let her ask the question, please.

MS. BOOK: Judge,—Judge, I just need to note for the record that counsel is talking to the witness.

I'd rather that you didn't say stop or go or make any motions with your hand, please. Thanks.

JUDGE KANG: Okay. I can hear it on my end. The objection's noted. But for the record what I heard was just Mr. MacLean's counsel trying to get him to stop talking so that he could hear the question. But the objection's still valid.

Mr. MacLean, please allow Agency counsel to ask the question before responding. And then wait for the next question.

[121]

If there is something that you need to be rehabilitated on or clarify, your attorneys will have a chance to redirect their questions to you, and you'll have a chance to explain it further.

Ms. Calaguas, please repeat your last question.

MS. CALAGUAS: Okay. I might have to go back a question or two just to get us all on the same page, Your Honor.

BY MS. CALAGUAS:

Q. Okay. When—again, when I asked you the question, "If—when you were asking with your supervisor, if in discussing the cancellation of RON missions, did you know whether or not you were discussing sensitive security information."

Do you recall—

A. No, I did not.

Q. Okay. And, in fact, you answered, "It didn't matter"; isn't that right?

A. In my deposition, that's what I answered.

Q. Yeah. It didn't matter to you whether or not you were discussing sensitive security information; isn't that right?

A. But it really did matter to me. That—I got caught up in that line of questioning, and that is not what my intention was. I never intended to break the law.

Q. So at the time that you answered the question during your deposition, your testimony is that you were confused, but [122] you're not—

A. That's a possibility.

Q. —but you're not confused today?

A. I—I probably was trying—this was my first deposition —probably trying to be all knowing and a little arrogant in my line of questioning [sic], but that was not my intent. When I—when I released that message,—

Q. Okay.

A. —I never intended to break the law or release information that would put—put people in danger.

Q. Okay. Well, do you recall then after giving your answer that it doesn't matter, I asked you why?

A. Yes, I do recall that. And that's not what I meant.

Q. Well, what did you say in response to my question why? Why didn't it matter?

A. You told me—you said I—I believed at the time that a law was being broken in my deposition. And my—when we were talking I believed that breaking the law or putting people's lives in danger or national security, that there was an issue of whether that information was being disclosed or not.

I don't—I don't believe I disclosed information that was illegal, or I was breaking the law, or did I have an intent to. All I wanted to do was protect lives and—and uphold the law.

Q. But you told me under oath during your deposition that day [123] that it did not matter to you whether it was confidential, law enforcement sensitive, SSI, or classified information; isn't that right?

A. Yes, ma'am.

MS. CALAGUAS: Just one second, Your Honor.

JUDGE KANG: Okay.

(Pause in the proceedings.)

MS. CALAGUAS: I have no further questions at this time.

JUDGE KANG: Okay. Mr. Berger, the witness passes back to you.

MR. BERGER: Yes, Your Honor. Yes, I'm going to go forward.

JUDGE KANG: Okay. Please go ahead.

MR. BERGER: Thank you.

REDIRECT EXAMINATION

BY MR. BERGER:

Q. Did you ever tell Mr. Meeks any flight numbers?

A. No.

Q. Did you ever tell Mr. Meeks any seat assignments?

A. No.

Q. Is it your understanding of the concept of regret that regret means to demonstrate contrition for doing something wrong?

A. Yes, sir.

[124]

Q. And did you understand at the time when you disclosed this information to Meeks that you were doing something wrong?

A. No.

Q. When you saw the text message on your cell phone and not the PDA, did you think the Agency was concerned with protecting the information in that text message?

A. No.

Q. If the Agency takes the position now that they believed that that information should have been protected, do you consider what the Agency did to have been reckless in the way they communicated that information to you on that cell phone?

A. If they—if they're saying that my actions were—

Q. Now—if they're saying now they believe that information was protected, do you believe that it was reckless of them to send you that message on that cell phone?

A. Yes, I do.

Q. With no labels, right? No encryption, correct?

A. And—and sent to nonencrypted Nokia phones.

Q. In your mind was that any less a "broadcast" that Ms. Calaguas uses in her questions than speaking in a public space, broadcasting on a cell phone like that?

A. Yeah. It was—it went out anywhere in the world where that—where that could have gotten into a cell phone reception, not like if you were in a closed room in a field office.

[125]

MR. BERGER: I don't have any further questions.

JUDGE KANG: Ms. Calaguas?

RECROSS/REDIRECT EXAMINATION

BY MS. CALAGUAS:

Q. When you spoke to Brock Meeks and disclosed the information to him, you told him that RON missions out of Vegas were being canceled; isn't that right?

A. No, I did not.

Q. You were specific to identify that the text messaging went to the Vegas Field—Federal Air Marshals; isn't that right?

A. No, ma'am. Not at all.

Q. You identified yourself as being from the Las Vegas Field Office; isn't that right?

A. Can I see the exhibit?

I don't remember if I was identified as a Las Vegas Federal Air Marshal.

Q. You don't remember identifying yourself as coming from Las Vegas when you were talking about these—

A. I don't remember. I thought you were referring to the article.

Q. I'm referring to your discussions with Mr. Meeks.

A. I—I don't remember if I told him I was—I was based in Las Vegas or not.

Q. But you told him that the text messaging went to officers from Las Vegas Field Office; isn't that right?

[126]

A. I don't remember saying specifically Las Vegas, because I knew there were Air Marshals across the country that were getting the same message.

Q. In fact, that's what you also told the investigator at the time that the Office of Professional Responsibility was looking into it; isn't that right?

A. Can I—can I re- —I don't know that verbatim. If that's the—if that's what the affidavit states, I—I need to read it. I don't know specific—I do not know from memory if I told anybody—if I stated that I—I identified to Brock Meeks that it was Las Vegas Air Marshals.

MS. CALAGUAS: That's fine. I think your affidavit can speaks for itself.

Give me one second, Your Honor.

(Agency counsel in San Francisco confer off the record.)

MS. CALAGUAS: I have no further questions.

JUDGE KANG: Ms. Calaguas, since this was the final witness approved for the Agency, does the Agency have anything else with respect to the evidentiary portion of this appeal?

MS. CALAGUAS: Just to clarify, Your Honor, that all exhibits from the Agency have been moved into evidence.

JUDGE KANG: Yes. Those issues were addressed in the Prehearing Conference Summary. There were a number of exhibits that were specifically excluded through specific orders. And I believe at the—and that was based on your [127] objection. And the Prehearing Conference Summary addressed the remaining exhibits. They are in the record and the weight that's given to them are as I detailed in that Prehearing Conference Summary.

MS. CALAGUAS: Yes, Your Honor. I recall that order. Thank you for clarifying it.

At this point the Agency rests.

JUDGE KANG: Okay.

MR. BERGER: Do I have the privilege of asking a question or two off of Agency counsel's questions?

JUDGE KANG: Yes, but—

MR. BERGER: I know this can't go on infinitely, but—

JUDGE KANG: My oversight, Mr.—Mr. Berger. I should have asked you if you had any further questions. Based on that—based on those few questions asked by the Agency,—

MR. BERGER: Yes.

JUDGE KANG: —Mr. Berger, obviously you do. The witness passes back to you.

MR. BERGER: Okay. Thank you.

FURTHER REDIRECT EXAMINATION

BY MR. BERGER:

Q. Are you aware whether there are any other sources of information to Mr. Meeks in his various articles other than yourself?

[128]

A. Yes. His subsequent article stated there was more than one source, and he sent me and my attorney, my former representative in this case, that there were—there were more than one. So there were three sources that he —that he spoke to.

MR. BERGER: Okay. I don't have further questions, Your Honor. Thank you.

JUDGE KANG: Again my apologies for that oversight.

Ms. Calaguas, any further questions for this witness before I release him from the stand?

MS. CALAGUAS: No, Your Honor. Thank you.

JUDGE KANG: All right. Let me go through the formality of releasing you then. Since both, both sets of attorneys do not have any further questions for you, Mr. MacLean, you are free to return to the table to be seated with your counsel. You're released from the stand.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

JUDGE KANG: All right. Ms. Calaguas,—

MS. CALAGUAS: Yes, Your Honor.

JUDGE KANG:—I realize we covered this before, but is there anything else with respect to the Agency's case for the evidentiary portion of this Appeal?

MS. CALAGUAS: No, Your Honor.

JUDGE KANG: Mr. Devine or Mr. Berger?

PETITIONER'S BRIEF

No. 13-894

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, PETITIONER

v.

ROBERT J. MACLEAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Congress has directed that the Transportation Security Administration "shall prescribe regulations prohibiting" the "disclosure of information obtained or developed" in carrying out certain transportation-security functions, if the agency "decides" that "disclosing the information would * * * be detrimental" to transportation security. Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101(e), 115 Stat. 603; Homeland Security Act of 2002, Pub. L. No. 107-296, Tit. XVI, § 1601(b), 116 Stat. 2312. Such information is referred to in the regulations as "sensitive security information." See, *e.g.*, 67 Fed. Reg. 8351 (Feb. 22, 2002).

The question presented is whether certain statutory protections codified at 5 U.S.C. 2302(b)(8)(A), which are inapplicable when an employee makes a disclosure "specifically prohibited by law," can bar an agency from taking an enforcement action against an employee who intentionally discloses sensitive security information.

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In the Supreme Court of the United States

No. 13-894

DEPARTMENT OF HOMELAND SECURITY, PETITIONER

v.

ROBERT J. MACLEAN

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 714 F.3d 1301. The opinions of the Merit Systems Protection Board (Pet. App. 19a-56a, 113a-139a) are reported at 116 M.S.P.R. 562 and 112 M.S.P.R. 4. The orders of the administrative judges (Pet. App. 57a-112a, 140a-164a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2013. A petition for rehearing was denied on August 30, 2013 (Pet. App. 165a-166a). On November 19, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 28, 2013. On December 18, 2013, the Chief Justice further extended the time to and including January 27, 2014, and the petition was filed

on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the appendix to this brief. App., *infra*, 1a-27a.

STATEMENT

1. Following the attacks of September 11, 2001, Congress enacted the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597, to "address the security of the nation's transportation system." H.R. Conf. Rep. No. 296, 107th Cong., 1st Sess. 54 (2001). In enacting the ATSA, Congress determined that "the best way to ensure effective Federal management of the nation's transportation system is through the creation of a new Administration" within the Department of Transportation "to be called the Transportation Security Administration (TSA)," whose responsibilities would "encompass security in all modes of transportation." *Id.* at 55; see ATSA, § 101(a), 115 Stat. 597 (49 U.S.C. 114(a)). The TSA's duties under the ATSA include daily security screening for air travel; receipt, analysis, and distribution of intelligence relating to transportation security; improvement of existing security procedures; assessment of security measures for cargo transportation; and oversight of security at airports and other transportation facilities. § 101(a), 115 Stat. 597-598 (49 U.S.C. 114(d)(1)-(2), (e)(1), (f)(1)-(3), (6)-(8) and (10)-(11)).

In addition to creating the TSA and specifying its responsibilities, the ATSA also ensured that certain information acquired or developed in the course of security activities, the dissemination of which could be

harmful, would be shielded from public disclosure. A preexisting statute, 49 U.S.C. 40119(b) (2000), had instructed that, "[n]otwithstanding" the Freedom of Information Act (FOIA), 5 U.S.C. 552, the Federal Aviation Administration was required to "prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security or research and development activities under" certain security-related provisions of Title 49, if it determined that "disclosing the information would * * * be an unwarranted invasion of personal privacy," "reveal a trade secret or privileged or confidential commercial or financial information," or "be detrimental to the safety of passengers in air transportation." See Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 1117; see also Air Transportation Security Act of 1974, Pub. L. No. 93-366, § 316, 88 Stat. 417. Pursuant to that congressional mandate, the Federal Aviation Administration had promulgated detailed regulations designating certain information as "sensitive security information" (SSI) and restricting the disclosure of such information. See, *e.g.*, 14 C.F.R. Pt. 191 (2000); see also 14 C.F.R. Pt. 191 (1977). The ATSA reassigned the duty to promulgate those regulations to the TSA, § 101(e), 115 Stat. 603, and the SSI regulations (with certain amendments) were subsequently transferred over to the TSA's authority, see 67 Fed. Reg. 8351 (Feb. 22, 2002).

The Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, Tit. IV, Subtit. A, § 403(2), 116 Stat. 2178, moved the TSA into the newly created Department of Homeland Security. A separate provision of that Act, currently codified at 49 U.S.C. 114(r), expanded upon the TSA's statutory mandate to prohibit the disclosure

of sensitive information. See HSA, Tit. XVI, § 1601(b), 116 Stat. 2312; see also Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Tit. V, § 568, 121 Stat. 2092 (moving former Section 114(s) to Section 114(r)). Section 114(r)(1) provides:

> Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would—
>
> (A) be an unwarranted invasion of personal privacy;
>
> (B) reveal a trade secret or privileged or confidential commercial or financial information; or
>
> (C) be detrimental to the security of transportation.

49 U.S.C. 114(r)(1). Congress also amended 49 U.S.C. 40119(b) to impose substantially similar obligations on the Secretary of Transportation. HSA, Tit. XVI, § 1601(a), 116 Stat. 2312.

In 2003, when the events giving rise to this case occurred, the TSA's SSI regulations generally defined SSI to include a range of sensitive information, including security plans, threat-detection mechanisms, and vulnerability assessments. In particular, the regulations defined SSI to include, *inter alia*, "[s]pecific details of aviation security measures * * * includ[ing] * * * information concerning specific numbers of Federal Air Marshals, deployments or

missions, and the methods involved in such operations," as well as other information deemed essential to transportation security, such as "[a]ny approved, accepted, or standard security program" adopted under certain regulations; "Security Directives and Information Circulars" promulgated under certain regulations; "[a]ny selection criteria used in any security screening process, including for persons, baggage, or cargo"; "[a]ny security contingency plan or information and any comments, instructions, or implementing guidance pertaining thereto"; and the technical specifications of certain security equipment (such as screening equipment). 49 C.F.R. 1520.7(a)-(f) and (j) (2002); see 67 Fed. Reg. at 8340. The regulations generally prohibited the disclosure of SSI unless the recipient had a "need to know" the information, 49 C.F.R. 1520.5(a) (2002); specifically defined the circumstances in which an individual had such a "need to know," see 49 C.F.R. 1520.5(b) (2002); and stated that an unauthorized disclosure was "grounds for a civil penalty and other enforcement or corrective action." 49 C.F.R. 1520.17; see 49 C.F.R. 1520.5(d) (2002).

The TSA's current SSI regulations, as well as the SSI regulations separately promulgated by the Department of Transportation, are substantially similar to the 2003 version (but include some new categories of SSI that have been added over the last decade). See 49 C.F.R. 1520.5, 1520.9(a)(2), 1520.17 (TSA); see also 49 C.F.R. Pt. 15 (Department of Transportation). A significant amount of information that the TSA designates as SSI would qualify to be classified under the President's Article II national-security powers. The TSA designates it as SSI, rather than formally classifying it, in order that it can, if necessary, be

shared quickly and securely with non-government personnel (such as airport and airline employees) whose cooperation is critical to ensuring transportation security, but who may not be cleared for more sensitive classified information. See, *e.g.*, 70 Fed. Reg. 1380 (Jan. 7, 2005) (stating that an "original *intent*" of the SSI regulations was "to share vulnerability assessments and threat information with entities in all transportation modes that need the information to help forestall future attacks").

2. Respondent is a former federal air marshal who was hired by the TSA in 2001. Pet. App. 2a. Under the air-marshal program as established by the ATSA, the TSA deploys federal air marshals on passenger flights in order to protect those flights from hijacking and other in-flight dangers. 49 U.S.C. 44917(a)(1)-(2); see ATSA, § 105(a), 115 Stat. 606. The TSA has discretionary authority to deploy federal air marshals on any flight, and it is required to station a federal air marshal on any flight that, in the agency's judgment, "present[s] high security risks." 49 U.S.C. 44917(a)(1)-(2); see ATSA, § 105(a), 115 Stat. 606-607.

As previously noted, the TSA has, since the inception of its SSI regulations, designated information about air-marshal deployments as SSI. See 67 Fed. Reg. at 8352; 49 C.F.R. 1520.7(j) (2002) (defining SSI to include "information concerning specific numbers of Federal Air Marshals, deployments or missions"); 49 C.F.R. 1520.5(b)(8)(ii) (defining SSI to include "[i]nformation concerning the deployments, numbers, and operations of * * * Federal Air Marshals, to the extent it is not classified national security information"). During his employment as an air marshal, respondent received written notification of the agen-

cy's SSI policies (and signed a statement acknowledging that he read and understood them), and he underwent in-person SSI training as well. Pet. App. 51a, 73a. He has testified that it was "very, very clear that you did not tell flight numbers and times of the flights you flew missions on" and that he was aware of other air marshals who had been terminated for disclosing such information. *Id.* at 73a-74a (citation omitted); see *ibid.* (noting respondent's awareness that air marshals had been fired for disclosing their flight information to significant others meeting them at the airport). Respondent also testified that "[i]f I told somebody that a particular flight was *not* going to have any protection on it, that endangered that specific flight." *Id.* at 74a (emphasis added; citation omitted).

In July 2003, the TSA briefed respondent on a "potential plot" to hijack United States airliners, Pet. App. 20a (citation omitted), in which the "[a]ttack venues [might] include the United Kingdom, Italy, Australia, or the East coast of the United States," J.A. 16. Shortly thereafter, respondent received a text message from the TSA stating that, for a particular window of time, the TSA would not be deploying federal air marshals on overnight missions from Las Vegas. Pet. App. 2a; *id.* at 20a & n.1. Respondent's supervisor subsequently explained to him that the TSA lacked sufficient funds for those particular missions. *Id.* at 59a. Respondent informed both his supervisor and the Office of the Inspector General for the Department of Homeland Security of his personal view that the TSA's decision about how to deploy its air marshals was not in the best interests of public safety. *Id.* at 21a. He was not, however, satisfied with the responses he received. *Ibid.*

Respondent then decided to reveal the TSA's air-marshal-deployment plans to the news media, in an effort to "create a controversy" that would force the TSA to change those plans. Pet. App. 2a (citation omitted). Respondent has testified that it did not matter to him, in formulating that scheme, whether the information he planned to reveal was SSI, *id.* at 81a, and an administrative judge found his claim that he was unaware the information was SSI not to be credible, *id.* at 81a, 100a-103a. After respondent told an MSNBC reporter about the TSA's deployment plans, the reporter published an article exposing those plans to the public and criticizing them. *Id.* at 2a. Members of Congress also criticized the plans. *Ibid.* The TSA ultimately did not follow the course of action that had been outlined in the original text message. *Ibid.*

The TSA was not aware initially that respondent had been the source of the disclosure. Pet. App. 2a. It learned of his involvement, however, when respondent appeared on NBC Nightly News to discuss a separate matter, in a disguise that proved to be inadequate. *Ibid.* The TSA removed respondent from his position as a federal air marshal for disclosing SSI without authorization. *Id.* at 2a-3a. The deciding official later testified that by divulging "information on * * * a particular group of flights that were not covered" by federal air marshals, respondent had "created a vulnerability within the aviation system" and "set us up for a possible another [sic] 9/11 incident." *Id.* at 91a (emphasis omitted).

3. Respondent challenged his removal before the Merit Systems Protection Board (MSPB), "an independent Government agency that operates like a

court" and has jurisdiction to review certain personnel actions. 5 C.F.R. 1200.1; see, *e.g.*, 5 U.S.C. 7513(d). One of respondent's claims was that his removal had violated 5 U.S.C. 2302(b)(8)(A). Pet. App. 3a. Under Section 2302(b)(8)(A), an agency generally cannot "take * * * a personnel action" against an employee for disclosing certain types of information, when the employee "reasonably believe[d]" that the information showed a "violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. 2302(b)(8)(A)(i) and (ii).[1] Section 2302(b)(8)(A) does not apply, however, if the employee's disclosure was "specifically prohibited by law." 5 U.S.C. 2302(b)(8)(A).

The MSPB ultimately rejected respondent's Section 2302(b)(8)(A) argument and sustained the agency's decision to remove him. Pet. App. 19a-56a. The MSPB recognized that the TSA, pursuant to a legislative mandate to prescribe regulations preventing the disclosure of certain types of information, had promulgated regulations that "identified SSI subject to * * * statutory nondisclosure as including information relating to [federal-air-marshal] deployments."

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[1] The current version of Section 2302(b)(8)(A)(i) differs slightly from the version in effect at the time of respondent's disclosure. Compare 5 U.S.C. 2302(b)(8)(A)(i) ("*any* violation of any law, rule, or regulation") (emphasis added), with 5 U.S.C. 2302(b)(8)(A)(i) (2006) ("*a* violation of any law, rule, or regulation") (emphasis added). Because that amendment is not relevant to the question presented, this brief will cite the current version.

Id. at 33a.[2] The MSPB additionally observed that the Ninth Circuit, in a separate proceeding that respondent had initiated, had "unequivocally declared that the information disclosed by [respondent] constituted SSI as defined in those regulations." *Id.* at 34a; see *MacLean* v. *Department of Homeland Sec.*, 543 F.3d 1145, 1150 (2008) (per curiam); 49 C.F.R. 1520.7(j) (2002). The MSPB accordingly reasoned that because respondent had "disclosed information that is specifically prohibited from disclosure by a regulation promulgated pursuant to an express legislative directive from Congress to TSA," the "disclosure was 'specifically prohibited by law'" for purposes of Section 2302(b)(8)(A). Pet. App. 34a-35a.

4. The Federal Circuit vacated the MSPB's decision and remanded for further proceedings. Pet. App. 1a-18a; see 5 U.S.C. 7703(a)(1) and (b)(1) (2006) (authorizing an employee to seek Federal Circuit review of an adverse MSPB decision). The court of appeals recognized that respondent's removal had reflected a proper application of the TSA's regulations. Pet. App. 5a-7a. It also agreed with the government that removal had been a reasonable penalty for a disclosure that had "compromised flight safety," created a

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[2] In the MSPB's view, the relevant legislative mandate was the version of 49 U.S.C. 40119(b) that was in effect when the TSA initially promulgated the regulations. Pet. App. 33a n.9. The briefs and decisions below accordingly focused on Section 40119(b). However, at the time of respondent's disclosure, the statute requiring and authorizing the TSA's SSI regulations was actually the provision now codified at 49 U.S.C. 114(r). See pp. 3-5, *supra*. For that reason, and for the sake of simplicity, this brief will focus on Section 114(r). In any event, because the language of the two statutes is nearly identical, the legal analysis would be similar under either one.

"threat to public safety," and "could have had catastrophic consequences." *Id.* at 7a-9a. The court concluded, however, that respondent's disclosure of SSI had not been "specifically prohibited by law" and that he was therefore entitled to invoke the protections of Section 2302(b)(8)(A). *Id.* at 10a-17a.

The court of appeals initially stated that it believed the parties to be in agreement that the "'specifically prohibited by law' proviso" applies only to disclosures "prohibited by a statute" and not to disclosures prohibited "by a regulation." Pet. App. 12a; see *id.* at 13a (perceiving the parties to agree that "a regulation * * * cannot be 'law'"). The court subsequently acknowledged, however, that "[r]egulations promulgated pursuant to Congress's express instructions *would* qualify as specific legal prohibitions" for purposes of applying the proviso. *Id.* at 15a (emphasis added). And it viewed the legislative mandate to promulgate SSI regulations to present "a very close case," because the mandate included a direct "charge" to the agency "to prescribe regulations pursuant to specific criteria (i.e., only information that would be detrimental to transportation safety)." *Ibid.* But the court ultimately concluded that, because the statute "gives some discretion to the Agency to fashion regulations for prohibiting disclosure," the statute's criteria were too "general" to "'specifically prohibit' employee conduct." *Id.* at 14a. In reaching that conclusion, the court relied in part on language from a Senate Report, without acknowledging that the report had addressed an unenacted version of Section 2302(b)(8), which had contained the phrase "prohibited by statute" rather than the phrase "specifically prohibited by law." *Id.* at 13a-14a (citing S. Rep. No.

969, 95th Cong., 2d Sess. 21 (1978) (Senate Report)); see Senate Report 154.

Having decided the critical legal question, the court of appeals remanded the case for a determination of whether respondent had reasonably believed his disclosure evidenced "a substantial and specific danger to public health or safety" or one of the other subjects listed in Section 2302(b)(8)(A). Pet. App. 16a. Judge Wallach concurred to express the view that "the facts alleged, if proven, allege conduct at the core of" the activity protected by that provision. *Id.* at 18a. The court of appeals denied the government's petition for rehearing en banc. *Id.* at 165a-166a.

SUMMARY OF ARGUMENT

The Federal Circuit recognized that Congress has directed the TSA to prescribe regulations prohibiting disclosures deemed "detrimental" to transportation security. Pet. App. 11a (citation omitted); see 49 U.S.C. 114(r)(1)(C). It also recognized that regulations implementing that congressional directive expressly designated information about federal-air-marshal deployments as SSI and that respondent's disclosure of such deployment information was accordingly forbidden. Pet. App. 5a-7a; see 49 C.F.R. 1520.7(j) (2002). The Federal Circuit nevertheless held that respondent's disclosure was not "specifically prohibited by law." 5 U.S.C. 2302(b)(8)(A); see Pet. App. 10a-17a. That holding precludes disciplinary action against respondent or any other federal employee for public disclosures of SSI that expose vulnerabilities in transportation security, so long as the disclosure was motivated by "reasonabl[e]"—even if unmeritorious—disagreement with the government's decision to give higher priority to other security con-

cerns. 5 U.S.C. 2302(b)(8)(A). The Federal Circuit's decision is wrong, dangerous, and warrants reversal.

A. The legislatively created scheme that prohibited respondent's disclosure constituted a "specific[] prohibit[ion] by law" for purposes of Section 2302(b)(8)(A). First, the SSI regulations that explicitly barred the disclosure of "information concerning specific numbers of Federal Air Marshals, deployments or missions," 49 C.F.R. 1520.7(j) (2002), in themselves triggered the "specifically prohibited by law" proviso. In the absence of a "clear showing" of contrary congressional intent, the phrase "by law" is presumed to include both statutes and substantive regulations that have the force and effect of law. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295-296 (1979). The nondisclosure regulations at issue here not only had the force and effect of law, but were affirmatively required by Congress, which was already aware of the content of those regulations when it enacted Section 114(r)(1).

Neither the Federal Circuit nor respondent has set forth any "clear showing" that Congress intended these congressionally dictated nondisclosure regulations to fall outside the scope of the phrase "by law." Although the text and legislative history of Section 2302(b)(8)(A) contain some indication that Congress did not want agencies to invoke internal procedural regulations to silence whistleblowers, any such concern would not extend to nondisclosure regulations promulgated pursuant to Congress's own explicit command. Respondent's narrow view of the "specifically prohibited by law" proviso to include only Acts of Congress, and not their direct implementing regulations, would impermissibly revive a rejected version of

the proviso that would have used the term "by statute" rather than the term "by law."

Second, even if the term "by law" were interpreted to refer solely to restrictions imposed by statutes, respondent's disclosure was "specifically prohibited by law" under Section 114(r)(1) itself. In *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975), this Court construed the statutory phrase "specifically exempted from disclosure by statute" to encompass a statute that authorized an agency to exercise broad interest-balancing discretion to determine whether certain information should be disclosed. The Section 2302(b)(8)(A) proviso at issue here ("specifically prohibited by law") is at least as broad as the one at issue in *Robertson*, and the degree of agency discretion under Section 114(r)(1) to prohibit the disclosure of information is, if anything, narrower than the degree of agency discretion at issue in *Robertson*. The applicability of the Section 2302(b)(8)(A) proviso in the circumstances of this case thus follows *a fortiori* from *Robertson*.

Respondent and the Federal Circuit have avoided the conclusion that Section 114(r)(1) satisfies the "specifically prohibited by law" proviso only by looking to the legislative history of a proposed version of the Section 2302(b)(8)(A) proviso that Congress never enacted. Although a Senate Report favored a more limited version of the proviso, Congress ultimately adopted proviso language broader than the language proposed in the Senate Report. In any event, even the narrow version of the proviso discussed in the Senate Report would have encompassed any statute that "establishes particular criteria for withholding or refers to particular types of matters to be withheld,"

Senate Report 21, a category that includes Section 114(r)(1). In fact, Section 114(r)(1) is much more specifically prohibitory than another statute—which simply provided that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure," 50 U.S.C. 403(d)(3) (1976)—that the Senate Report identified as falling within its version of the proviso. Senate Report 21-22.

B. The Federal Circuit's decision gives short shrift to Congress's express intent both to prohibit disclosure of SSI and to handle concerns about confidential matters internally without exposing sensitive information to public view. In crafting Section 2302(b)(8), Congress balanced its desire to encourage reports of perceived government missteps with the need to protect the secrecy of information whose disclosure could cause serious harm. Section 2302(b)(8) does not authorize a federal employee to go to the media *whenever* he has a reasonable belief that particular information shows government misfeasance. Instead, when that information has been designated confidential (because its publication would, for example, constitute an unwarranted invasion of privacy or be detrimental to transportation security), the employee receives statutory protection only if he raises his concerns to the agency's Inspector General, to the Office of Special Counsel, or to other appropriate officials, who can investigate thoroughly while keeping the information secure. 5 U.S.C. 2302(b)(8)(B). He can be disciplined, however, if he eschews those avenues and instead chooses to reveal that information to the public, 5 U.S.C. 2302(b)(8)(A).

The decision below imperils public safety by dramatically reducing the effectiveness of Congress's scheme for keeping sensitive security information from falling into the wrong hands. SSI by its nature involves public-safety matters. Its content frequently reflects difficult choices about how best to allocate finite security resources; those difficult choices will often be subject to plausible objections; and employees will thus frequently have a basis for claiming to "reasonably believe[]," 5 U.S.C. 2302(b)(8), that disclosing SSI will be beneficial. But as Congress recognized in enacting Section 114(r)(1), public disclosure of information designated as SSI—which includes, for example, security plans, threat-detection mechanisms, and vulnerability assessments—could have disastrous consequences. Congress could not have intended that a single employee's objection to a TSA decision, no matter how well-intentioned that objection might be, would allow the employee to take matters into his own hands and divulge information that could be exploited to jeopardize the country's transportation infrastructure and the lives and livelihoods of those who depend upon it.

ARGUMENT

THE DISCLOSURE OF SENSITIVE SECURITY INFORMATION IS "SPECIFICALLY PROHIBITED BY LAW" WITHIN THE MEANING OF 5 U.S.C. 2302(b)(8)(A)

The Federal Circuit's decision disregards the plain text of Section 2302(b)(8)(A), seriously undermines the effectiveness of the congressionally mandated SSI regime, invites individual federal employees to make disclosures that will threaten public safety, and should be reversed. In the course of its efforts to secure the Nation's transportation network, the TSA necessarily

develops and acquires a great deal of information, including information about security vulnerabilities, that has the potential to cause extreme harm if publicly disclosed. In recognition of that fact, Congress has directed that the TSA "shall prescribe regulations" prohibiting disclosures that would, in the expert judgment of the TSA, "be detrimental to the security of transportation." 49 U.S.C. 114(r)(1)(C).

The decision below, however, effectively permits individual federal employees to override the TSA's judgments about the dangers of public disclosure. According to the court of appeals, no matter how harmful it might be for particular SSI to fall into the wrong hands, an employee is not subject to discipline for publicizing that SSI, so long as he reasonably believes that the disclosure serves one of the interests listed in 5 U.S.C. 2302(b)(8)(A). The Federal Circuit's decision thus clears a path for any of TSA's more than 60,000 employees with access to SSI to do what respondent did here: go public with an internal disagreement about how best to allocate finite security resources; put lives in danger by identifying potential vulnerabilities in areas that have received fewer resources; and then attempt to avoid repercussions on the ground that he reasonably believed that publicizing such vulnerabilities revealed "a substantial and specific danger to public health or safety," 5 U.S.C. 2302(b)(8)(A)(ii).

That result contravenes the manifest intent of Congress. The protections afforded by Section 2302(b)(8)(A) do not apply to public disclosures that are "specifically prohibited by law." That proviso squarely encompasses public disclosures of SSI, which are prohibited pursuant to an express congressional

directive. Employees with concerns that implicate SSI are instead protected by Section 2302(b)(8)(B), which covers disclosures of confidential information to intragovernmental oversight authorities that are able to investigate possible problems without the need for harmful public disclosures.

A. Section 2302(b)(8)(A)'s "Specifically Prohibited By Law" Proviso Encompasses The Congressionally Created SSI Nondisclosure Scheme

The Federal Circuit's conclusion that the disclosure of SSI is not "specifically prohibited by law" is flawed as a matter of both statutory interpretation and common sense. The SSI regulations reflect an expert agency's implementation of Congress's express instruction that disclosures dangerous to transportation security be prohibited. See 49 U.S.C. 114(r)(1)(C); 67 Fed. Reg. at 8351; 49 C.F.R. Pt. 1520. Whether the relevant "law" is considered to be the regulations that Congress required the TSA to promulgate, the statute that directed the agency to promulgate those regulations, or the two in combination, the bottom line is that the very purpose of the SSI scheme designed by Congress is to "specifically prohibit[]" the exposure of information the secrecy of which is vital to public safety.

1. The term "by law" in Section 2302(b)(8)(A) includes legislatively mandated SSI regulations

The SSI regulations on their face "specifically prohibited" respondent's public disclosure that certain flights from Las Vegas (those requiring overnight missions) would not have air marshals aboard. See Pet. App. 5a-7a (concluding that respondent violated a nondisclosure prohibition); *MacLean* v. *Department of*

Homeland Sec., 543 F.3d 1145, 1150 (9th Cir. 2008) (per curiam) (same). At the time respondent made that disclosure, those regulations expressly prohibited sharing "information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations" with unauthorized persons. 49 C.F.R. 1520.7(j) (2002); see 49 C.F.R. 1520.5(a)-(b) (2002); see also 49 C.F.R. 1520.5(d) (2002). And the prohibition against respondent's disclosure was a prohibition "by law" whether it appeared directly in the statute or instead in the regulations that the statute required the TSA to promulgate.[3]

a. In *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), this Court construed the statutory phrase "authorized by law" in 18 U.S.C. 1905 (1976) to include not just authorization conferred directly by statute, but also by "properly promulgated, substantive agency regulations." 441 U.S. at 295. The Court observed that "[i]t has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.'" *Ibid.*; see *id.* at 295 n.18 (citing cases). "This doctrine," the Court continued, "is so well established that agency regulations implementing federal statutes have been held to pre-

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[3] Respondent has contended (Br. in Opp. 14-18) that the government waived this argument in the court of appeals. For reasons explained in the government's certiorari-stage filings (Pet. 15-16; Cert. Reply Br. 10-12), that contention is incorrect. In any event, the Court presumably considered this argument at the certiorari stage and concluded that it did not present an impediment to effective review of the question presented. See *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 530-531 (2002); *United States* v. *Williams*, 504 U.S. 36, 40-41 (1992); *Stevens* v. *Department of the Treasury*, 500 U.S. 1, 8 (1991).

empt state law under the Supremacy Clause." *Id.* at 295-296. "It would therefore take a clear showing of contrary legislative intent before the phrase 'authorized by law' in § 1905 could be held to have a narrower ambit than the traditional understanding." *Id.* at 296.

As respondent appears to acknowledge, that same "clear showing" rule should apply to Section 2302(b)(8)(A)'s "specifically prohibited by law" proviso. See Br. in Opp. 23 (recognizing that "the word 'law' sometimes—perhaps even usually—encompasses regulations" and referencing *Chrysler Corp.*'s "clear showing" rule). The "well established" interpretive principles discussed in *Chrysler Corp.*, and which the Court in *Chrysler Corp.* applied to a decades-old statute, were just as "well established" six months before *Chrysler Corp.* was decided, when Congress enacted Section 2302(b)(8)(A) proviso as part of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, § 101(a), 92 Stat. 1116. Indeed, consistent with *Chrysler Corp.*, standard definitions of "law" around that time would naturally have encompassed regulations of the sort described in that decision. See, *e.g.*, *American Heritage Dictionary of the English Language* 741 (1976) (defining "law" to include "[t]he body of rules governing the affairs of man within a community"); *Black's Law Dictionary* 1028 (rev. 4th ed. 1968) (defining law to include "[t]hat which is laid down, ordained, or established"); *Webster's New International Dictionary* 1401 (2d ed. 1958) (defining "law" in the context of law and political science primarily to include "[a] rule of (external) conduct or action which is prescribed, or is formally recognized as binding, by the supreme governing authority and is enforced by a sanction, as any edict, decree, rescript,

order, ordinance, statute, resolution, rule, judicial decision, usage, etc., made, or recognized, and enforced, by the controlling authority" or "[t]he whole body of such rules").

b. Nothing in Section 2302(b)(8)(A) provides a "clear showing," *Chrysler Corp.*, 441 U.S. at 296, that the phrase "by law" excludes substantive nondisclosure regulations, like the SSI regulations, that were promulgated pursuant to an express congressional directive. Such regulations are inextricably intertwined with the statutes that mandate their promulgation and are "law" to the same extent that the statutes themselves are.

The Court's decision in *Chrysler Corp.* explains that a regulation has the "force and effect of law" when it "affect[s] individual rights and obligations," 441 U.S. at 302 (citation omitted); its "promulgation * * * conform[s] with any procedural requirements imposed by Congress," *id.* at 303; and the statute authorizing it can "reasonably" be said to have "contemplate[d]" the regulation, *id.* at 308. The SSI regulations satisfy all three requirements. First, they "certainly affect individual rights and obligations," because they address issues of "confidentiality" and the disclosure of information. *Id.* at 303. Second, the procedural soundness of the regulations has not been disputed in this case.[4] Third, a congressional "grant of

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[4] In its initial adoption, in 2002, of an amended version of the Federal Aviation Administration's preexisting SSI regulations, the TSA followed the procedure specified in 5 U.S.C. 553(b)(B), which allows an agency to promulgate a final rule without prior notice-and-comment "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are imprac-

authority" cannot more clearly "contemplate[] the regulations issued," *id.* at 308, than in a circumstance, like this one, where Congress has specifically directed an agency to issue such regulations. Indeed, the connection in this case is particularly strong, given that the TSA, pursuant to the ATSA, had *already* promulgated SSI regulations—including the regulation designating air-marshal-deployment information as SSI—when Congress enacted Section 114(r). See HSA, § 1601(b), 116 Stat. 2312; 67 Fed. Reg. at 8340-8341, 8352. Section 114(r)'s renewal, and expansion, of the TSA's obligation to promulgate nondisclosure regulations is most reasonably interpreted to reflect Congress's approval of the regulations already in place. Cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Respondent contends, however, (Br. in Opp. 19-20) that Section 2302(b)(8)(A)'s "specifically prohibited by law" proviso cannot encompass *any* regulations, regardless of how explicitly Congress may have required their promulgation, because other places in the statute include the phrase "law, rule, or regulation." That contention is unsound. The juxtaposition of the

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ticable, unnecessary, or contrary to the public interest." *Ibid.*; see 67 Fed. Reg. at 8340. The TSA explained that the rulemaking "mostly [was] an administrative action moving rules from one title to another in the Code of Federal Regulations"; that the ATSA "impose[d] a statutory mandate" for certain amendments to the regulations; and that the agency had determined that "notice and public comment under 5 U.S.C. 553(b) are impracticable and contrary to the public interest." *Id.* at 8349. The final rule solicited comments for future revisions. *Id.* at 8340, 8349.

term "law" with the phrase "law, rule, or regulation" may sometimes support an inference that the term "law" alone is to *some* degree narrower in scope than the phrase "law, rule, or regulation." As the Court explained in *Department of the Treasury* v. *Federal Labor Relations Authority*, 494 U.S. 922 (1990), a "statute that in one section refers to 'law, rule or regulation,' and in another section to only 'laws' cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places." *Id.* at 932; see *Russello* v. *United States*, 464 U.S. 16, 23 (1983). But the fact that "law" may be narrower than "law, rule, or regulation" does not mean that "by law" should have the particular, especially cramped, meaning advanced by respondent, under which *no* regulation—not even one Congress has mandated—counts as "law."

As the Court recognized in *Department of the Treasury* v. *Federal Labor Relations Authority*, it would be "a permissible (though not an inevitable) construction" to conclude that "the term 'applicable laws' * * * extends to *some*, but not all, rules and regulations," notwithstanding its appearance in a statute that also referred to "'any law, rule or regulation.'" 494 U.S. at 932-933 (emphasis added; citation omitted). Similarly here, Congress's use of the expansive phrase "law, rule, or regulation" does not in itself suggest that the definitions of "law," "rule," and "regulation" are mutually exclusive. Many, if not all, "regulations" can also be considered "rules," and vice versa. *Black's Law Dictionary* 1451 (rev. 4th ed. 1968) (defining "regulation" to include "a *rule* or order prescribed for management or government") (emphasis added); *id.* at 1496 (defining "rule" to include "[a]n

established standard, guide, or *regulation*") (emphasis added). And it is hardly unusual for a "rule" or a "regulation" to be considered "law." See *Chrysler Corp.*, 441 U.S. at 295-296. Accordingly, Congress could readily have employed the catch-all phrase "law, rule, or regulation" in certain places in an effort to capture the entirety of all three categories, without intending that the categories be considered completely distinct. The broader phrase might, for example, encompass procedural rules and regulations that, under *Chrysler Corp.*, would not meet the definition of "law" standing alone.

In the particular context of Section 2302(b)(8)(A), an interpretation of "by law" that encompasses at least some regulations—including, at a minimum, nondisclosure regulations that Congress has required a federal agency to adopt—is far more coherent than respondent's alternative. If, as respondent suggests, the term "by law" excludes all regulations, then even if Congress enacted a statute directing the TSA to "promulgate a regulation barring the disclosure of air-marshal-deployment information," and the TSA complied with that statute, no "law" would prohibit the disclosure of such information for purposes of Section 2302(b)(8)(A). That conclusion defies both language and logic. Whether the text of a statute itself bars disclosure, or instead expressly directs an agency to promulgate a regulation to that effect, the end result (a prohibition on disclosure) is the product of congressional design, and it makes no sense to view the result as accomplished "by law" in one case but not the other.

Contrary to respondent's contention (Br. in Opp. 20), his crabbed interpretation of the phrase "by law"

finds no support in the "broader structure" of Section 2302(b)(8)(A). Respondent notes (*ibid.*) that Section 2302(b)(8)(A)'s protections are inapplicable both when a disclosure was "specifically prohibited by law" and when the disclosed information was "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." He reasons from this that Congress did not intend for courts to create other "unmentioned" exceptions. *Ibid.* (citation omitted). The issue here, however, is not the existence of an "unmentioned" exception, but instead the scope of the *express* exception for disclosures "specifically prohibited by law."

Respondent also suggests (Br. in Opp. 20) that the exception for certain Executive Orders "suggests intentional exclusion" of other "categor[ies] of Executive branch authority." But unlike substantive regulations that an agency is specifically required by statute to promulgate, an Executive Order that lacks a clear statutory basis would not necessarily fall within the presumptive definition of "law." See *Chrysler Corp.*, 441 U.S. at 304-308 (suggesting that regulations authorized solely by Executive Order would not be considered "law" in the context of 18 U.S.C. 1905 (1976)). Congress's clarification of how Section 2302(b)(8)(A) applies in the context of Executive Orders accordingly creates no inference that congressionally mandated SSI regulations fail to qualify as "law."

c. The legislative history of Section 2302(b)(8)(A) is consistent with an interpretation of the "specifically prohibited by law" proviso as including the SSI regulations that Section 114(r)(1) directed the TSA to promulgate. When Congress was designing the CSRA, the Senate proposed a version of the proviso

that would have been limited to only those disclosures "prohibited by *statute*." Senate Report 21, 154 (emphasis added). Congress did not, however, adopt that proposal, but instead enacted a more broadly worded proviso, applicable to disclosures "specifically prohibited by *law*." 5 U.S.C. 2302(b)(8)(A) (emphasis added); see H.R. Conf. Rep. No. 1717, 95th Cong., 2d. Sess. 130 (1978) (Conference Report). Congress's replacement of the word "statute" with the word "law" indicates that Congress did *not* intend the proviso to be limited solely to statutes. See *Russello*, 464 U.S. at 23-24 ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

The legislative history does support the view that Congress intended to exclude *some* regulations from the scope of the proviso. As respondent notes, an early proposal by the House included a proviso for disclosures "prohibited by law, rule, or regulation." Br. in Opp. 21; see Senate Report 21. The final language of the proviso as enacted falls somewhere in between that early House proposal and the subsequent Senate proposal to "narrow[] the proviso" to cover only statutes, Senate Report 21. The conference report accompanying the final version stated that the proviso "does not refer to agency rules and regulations" but instead "to statutory law and court interpretations of those statutes." Conference Report 130. The enacted language of the proviso thus appears to reflect, to a degree, the concerns that had animated the Senate proposal. Those concerns, however, do not provide a "clear showing," *Chrysler Corp.*, 441 U.S. at

296, that Congress intended the term "law" to be equivalent to the discarded term "statute."

The Senate's concerns had been directed to the possibility that agencies might adopt "*internal procedural* regulations against disclosure" that would "discourage an employee from coming forward with allegations of wrongdoing." Senate Report 21 (emphasis added). During a mark-up session, Senator Humphrey had noted that "it is standard procedure for agencies to have internal regulations specif[ying] which agency employ[ee]s can talk to the press," and expressed concern with proviso language under which "all non-specified employees could be denied the whistle blower protection." Senate Comm. on Governmental Affairs, *Mark-Up Session on S. 2640: The Civil Service Reform Act of 1978*, at 15 (May 22, 1978). He deemed such a prospect to be inconsistent with the proviso's basic purpose "to protect against disclosure of classified information or other information that most of us agree should be kept secret," and he accordingly advocated calibrating the proviso's language to ensure that "information that should be kept secret will continue to be without unnecessarily restricting the whistle blower protection." *Id.* at 15-16; see *id.* at 8-9 (suggestion by Senator Javits to narrow the proviso to avoid "enabl[ing] an agency to suffocate a whistle blower").

The Senate's concerns with "internal procedural" regulations, like the press-related regulations mentioned by Senator Humphrey, would not apply to nondisclosure regulations, like the SSI regulations at issue here, that Congress *itself* expressly instructed an agency to promulgate. The latter set of regulations are a subclass of "substantive rules," which both Con-

gress and this Court have long recognized to be distinct from "rules of agency organization, *procedure*, or practice." *Chrysler Corp.*, 441 U.S. at 301 (emphasis added) (quoting 5 U.S.C. 553(b) and (d) (1976)). They reflect the requirements of a specific congressional nondisclosure statute; they "implement th[at] statute," *id.* at 302-303 (citation omitted); and they are therefore comfortably encompassed within the text of the "specifically prohibited by law" proviso as enacted by Congress.

2. Section 114(r)(1) itself "specifically prohibit[s]" the disclosure of SSI

Even if the relevant inquiry were restricted to the four corners of an Act of Congress, the disclosure in this case would still have been "specifically prohibited by law" within the meaning of Section 2302(b)(8)(A). Section 114(r) sets forth three "specific[]" categories of information: information whose disclosure, in the TSA's judgment, would "be an unwarranted invasion of personal privacy"; information whose disclosure, in the TSA's judgment, would "reveal a trade secret or privileged or confidential commercial or financial information"; and information whose disclosure would, in the TSA's judgment, "be detrimental to the security of transportation." 49 U.S.C. 114(r)(1)(A)-(C). And Section 114(r)(1) "prohibit[s]" the disclosure of that information by providing that the TSA "shall prescribe regulations" to that effect. 49 U.S.C. 114(r)(1).

a. The applicability of the "specifically prohibited by law" proviso in the circumstances of this case follows *a fortiori* from this Court's decision in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975). That case involved a provision of the FOIA, known as Exemption 3, which at that time permitted an agency to

withhold from the public any information "specifically exempted from disclosure by statute." *Id.* at 257 (quoting 5 U.S.C. 552(b)(3) (1970)). The issue in *Robertson* was whether particular information was "specifically exempted from disclosure by statute," within the meaning of Exemption 3, when an agency had exercised discretion conferred by statute to designate that information as confidential. *Id.* at 256-258 & n.4. The statute in question permitted the agency to withhold a certain type of information from disclosure whenever the agency had made a "judgment" that disclosure was "not required in the interest of the public" and "would adversely affect the interests" of someone objecting to the disclosure. *Id.* at 258 n.4 (quoting 49 U.S.C. 1504 (1970)). This Court concluded that information withheld in that fashion was covered by Exemption 3, *id.* at 261-267, rejecting the view that the scheme vested too much discretion in the agency to satisfy Exemption 3's "specifically exempted from disclosure by statute" proviso, see *id.* at 260, 267.

As a textual matter, the result in *Robertson* directly controls this case. The proviso at issue here ("specifically prohibited by law") is effectively identical in all relevant respects to the proviso at issue in *Robertson* ("specifically exempted from disclosure by statute"). The only relevant difference between the two provisos—Section 2302(b)(8)(A)'s use of the term "law," rather than "statute"—suggests that the proviso here is *broader* than the proviso at issue in *Robertson*. At the same time, the statutory authority at issue here (to promulgate regulations precluding the disclosure of information deemed "detrimental to the security of transportation") is, if anything, even *more* specifically prohibitory than the statutory authority at

issue in *Robertson* (to preclude the disclosure of information based on an agency's balancing of public and private interests). The Federal Circuit's view (Pet. App. 14a) that the statutory authority at issue in this case "does not 'specifically prohibit'" disclosures, because it "provides only general criteria for withholding information and gives some discretion to the Agency," accordingly cannot be squared with *Robertson*. The combination of a broader proviso and a more specific nondisclosure statute makes this an even easier case for proviso coverage than *Robertson* itself.

Respondent, echoing the Federal Circuit, asserts that Section 114(r)(1) "'does not expressly prohibit employee disclosures' at all; it 'only empowers the Agency to prescribe regulations prohibiting disclosure.'" Br. in Opp. 24 (quoting Pet. App. 13a). But Section 114(r)(1) is just as prohibitory as the statute at issue in *Robertson*. Both statutes anticipate and rely on agency action—in *Robertson*, adjudication; here, regulation—to carry out congressional intent. This case also presents the additional circumstance, not present in *Robertson*, that Congress was actually on notice, when it enacted Section 114(r)(1), of precisely how the agency would implement that statute. As previously noted, Congress enacted Section 114(r)(1) against a backdrop that already included SSI regulations promulgated by the TSA, including the regulation that respondent violated here, and its reauthorization of such regulations presumably reflects its approval of preexisting agency practice. See p. 22, *supra*.

Respondent, again echoing the Federal Circuit, also asserts that Section 114(r)(1) is insufficiently specific because "[a]t best, it 'provides only general crite-

ria for withholding information.'" Br. in Opp. 25 (quoting Pet. App. 14a). But the Court in *Robertson* did not require the statute at issue in that case "to specify or categorize the particular documents it authorizes to be withheld" in order to fall within Exemption 3's "'specifically exempted from disclosure by statute'" proviso, 422 U.S. at 260; see *id.* at 265. And there is no sound basis for finding the enumerated criteria in Section 114(r)(1) to be any *less* specific than the more amorphous interest-balancing contemplated by the statute in *Robertson*.

b. Although much of the specific reasoning in *Robertson* turned on factors tied to FOIA, see 422 U.S. at 261-267, *Robertson*'s interpretation of the then-existing text of the Exemption 3 proviso is instructive on the meaning of Section 2302(b)(8)(A)'s proviso. Congress enacted Section 2302(b)(8)(A) just three years after *Robertson*. This Court has "often observed that when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 589-590 (2010) (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998)); see, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006). Congress thus presumably expected that courts would interpret the Section 2302(b)(8)(A) proviso at least as broadly as this Court had interpreted the similar Exemption 3 proviso at issue in *Robertson*.

Evidence of Congress's reaction to *Robertson* supports that presumption. In the wake of *Robertson*, Congress narrowed the language of FOIA's Exemp-

tion 3 to apply only to information "specifically exempted from disclosure by statute (other than section 552b of this title), *provided that* such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. 552(b)(3) (1976) (emphasis added); see *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 121 n.18 (1980). But when Congress enacted Section 2302(b)(8)(A) shortly thereafter, it included a "specifically prohibited by law" proviso that was not subject to any similar limitations. CSRA, § 101(a), 92 Stat. 1116. The natural inference is that Congress did not intend to incorporate those limitations, and instead intended the Section 2302(b)(8)(A) proviso to be interpreted in a broader fashion, consistent with *Robertson*.

That inference is reinforced by the legislative history of Section 2302(b)(8)(A). As previously discussed, the Senate had proposed a version of the proviso that would have applied only to disclosures "prohibited by statute." Senate Report 154. The Senate Report accompanying that proposal expressed the view that the suggested "prohibited by statute" proviso should encompass only the types of statutes covered by the amended Exemption 3. *Id.* at 21. But Congress rejected the Senate's proposal in favor of a more broadly worded proviso ("specifically prohibited by law"). 5 U.S.C. 2302(b)(8)(A); see H.R. Rep. No. 1403, 95th Cong., 2d Sess. 146 (1978); Conference Report 130. Even if adoption of the Senate version would have implied the existence of the various nontextual limita-

tions to which the Senate Report referred, rejection of the Senate version implies the opposite.

3. In any event, assuming *arguendo* that the Section 2302(b)(8)(A) proviso did incorporate those implicit limitations—as respondent and the Federal Circuit have assumed, see Br. in Opp. 24; Pet. App. 13a-14a—the legislative mandate to promulgate the SSI regulations would satisfy them. Even under the Senate Report's restrictive view, "a statute which establishes particular criteria for withholding or refers to particular types of matters to be withheld" would fall within the proviso's scope. Senate Report 21. The legislative mandate here, which describes specific categories of information that the TSA is required to keep confidential, see 49 U.S.C. 114(r)(1), "establishes particular criteria for withholding or refers to particular types of matters to be withheld."

Section 114(r)(1) compares favorably in this respect with a statute that the Senate Report specifically identified as one that would fall within the narrow proviso that it proposed. The Senate Report, in the course of setting forth its view that a "prohibited by statute" proviso would implicitly incorporate limitations like those in FOIA's amended Exemption 3, expressed its "understanding that section 102(d)(3) of the National Security Act of 1947 * * * has been held to be" a statute that would satisfy those limitations. *Id.* at 21-22. Section 102(d)(3) provided that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." 50 U.S.C. 403(d)(3) (1976). The legislative mandate here—which expressly directs the TSA to prohibit the disclosure of three particular categories of information in a particular

manner (promulgation of regulations), see 49 U.S.C. 114(r)(1)—is even more specific and prohibitory than Section 102(d)(3). And not only the Senate Report, but also this Court, has understood Section 102(d)(3) to be covered by FOIA's amended Exemption 3. Senate Report 21-22; *CIA* v. *Sims*, 471 U.S. 159, 167-168 (1985) (agreeing with the "uniform view among other federal courts" that Section 102(d)(3) is "a withholding statute under Exemption 3"). There is no sound reason why Section 102(d)(3) would fall within FOIA's Exemption 3, but Section 114(r)(1) would fall outside the more broadly worded Section 2302(b)(8)(A) proviso.[5]

B. Allowing Federal Employees To Publicly Disclose SSI Would Subvert Congress's Intent And Create Serious Risks To Public Safety

The Federal Circuit's conclusion in this case, that Section 2302(b)(8)(A) can immunize respondent from disciplinary action for disclosing SSI, undermines the careful line that Congress drew between concerns that

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[5] As respondent appears to recognize (Br. in Opp. 6-8, 30), Section 114(r)'s preamble, which clarifies that the TSA shall promulgate nondisclosure regulations "[n]otwithstanding section 552 of title 5," 49 U.S.C. 114(r)(1), does not limit the effect of those regulations to the context of FOIA requests, but instead is consistent with the promulgation of regulations that prohibit unauthorized disclosures more generally. See Pet. App. 5a-9a; *MacLean*, 543 F.3d at 1149-1150. Were it otherwise, TSA employees could make sensitive and dangerous disclosures at will, so long as they were not responding to a FOIA request when doing so. See *Public Citizen, Inc.* v. *FAA*, 988 F.2d 186, 195 (D.C. Cir. 1993) ("Congress can hardly have intended for the FAA to be able to resist under [a predecessor to Section 114(r)(1)] a FOIA request for security-sensitive information * * * but not a request for precisely the same information under another statute.").

an employee may voice in public and those that he should instead raise with the Inspector General or the Office of Special Counsel. The general purpose of Section 2302(b)(8) is to "encourage government personnel to blow the whistle on wasteful, corrupt or illegal government practices without fearing retaliatory action by their supervisors or those harmed by the disclosures." *Marano* v. *Department of Justice*, 2 F.3d 1137, 1142 (Fed. Cir. 1993). But Congress did not pursue that objective to the exclusion of all others. The statute also embodies a countervailing concern that employees not reveal to the public—and instead reveal only to internal watchdogs—information that has legitimately been shielded from public view for reasons unrelated to whistleblowing.

1. Under Section 2302(b)(8), any employee who comes across information that he "reasonably believes" shows a "violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" can raise his concerns without fear of employment-related reprisal. 5 U.S.C. 2302(b)(8)(A)(i) and (ii), (B)(i) and (ii). But the manner in which he may raise those concerns depends upon whether the disclosure of information is "specifically prohibited by law" (or "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs"). 5 U.S.C. 2302(b)(8)(A). If no such prohibition exists, then there is no reason to believe that any harm from public disclosure will be significant enough to outweigh the benefits of public debate, and the employee may go public with the information. See *ibid.*

If such a prohibition does exist, however, Section 2302(b)(8) does not permit the employee himself to decide whether the benefits of public disclosure outweigh the interests underlying the prohibition against it. Instead, the employee, if he wishes to avoid disciplinary action, must raise his concerns through internal channels: he may go either "to the Inspector General of [the] agency or another employee designated by the head of the agency to receive such disclosures" or "to the Special Counsel," who operates independently of the agency. 5 U.S.C. 2302(b)(8)(B);[6] see 5 U.S.C. 1211-1212. Those channels provide meaningful opportunities for the exposure of problems within an agency that warrant corrective action, while at the same time respecting the need to shield particular information from public view. If, for example, the employee goes to the Special Counsel, the Special Counsel is required to evaluate the information within 15 days, 5 U.S.C. 1213(b); may compel the agency to investigate the matter and file a written report, 5 U.S.C. 1213(c)-(d); and must transmit the report (generally along with any comments from the employee whose disclosure initiated the investigation) to the President, relevant congressional committees, and, potentially, other agencies (such as the Department of Justice), 5 U.S.C. 1213(e); see 5 U.S.C. 1213(h) (generally requiring the Special Counsel to maintain the originating employee's confidentiality).

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[6] As with Section 2302(b)(8)(A)(i), see note 1, *supra*, the text of Section 2302(b)(8)(B)(i) differs slightly from the version in effect at the time of respondent's disclosure. Compare 5 U.S.C. 2302(b)(8)(B)(i), with 5 U.S.C. 2302(b)(8)(B)(i) (2006). That amendment is not relevant here.

Under the Federal Circuit's decision, however, an employee may disregard those carefully designed procedures for maintaining the confidentiality of sensitive information and unilaterally choose to make public disclosures that the TSA has legitimately determined, in response to a congressional directive, to "be detrimental to the security of transportation." 49 U.S.C. 114(r)(1)(C). Congress could not have intended the confidentiality of sensitive security information to depend so precariously on the idiosynchratic individual judgments of each of the TSA's more than 60,000 employees. Congress presumably understood, in crafting Section 2302(b)(8), that not every internal complaint would be resolved to the complaining employee's complete satisfaction. Respondent's individual experience in this case (which apparently did not include any attempt to contact the Office of Special Counsel) did not entitle him to substitute his own judgment for that of Congress, decide that sensitive matters are better debated in public, and divulge information whose confidentiality is critical to transportation security.

Once respondent publicly exposed a set of flights that would not be protected by air marshals, he left the TSA with no choice but to put air marshals on at least some of those flights, regardless of whether doing so would otherwise have been the optimal plan. See Pet. App. 93a-94a. Although respondent and his supporters—including, perhaps, some individual Members of Congress—might believe that respondent's disclosure in this case was beneficial, the "specifically prohibited by law" proviso does not allow for a post hoc inquiry into whether the ends justified the means. The proviso instead forecloses employees

from arrogating to themselves the authority to make individual choices with such far-reaching and potentially injurious effects. However benign a particular employee's motives might be, he will most likely lack access to all of the information that led the TSA to make particular security decisions; his "reasonabl[e] belie[f]" in the salutary effect of his disclosure will not necessarily be correct; and Section 2302(b)(8)(A) does not invest him with veto authority over the agency's normal decisionmaking processes on sensitive security matters.

2. Permitting an employee who discloses SSI to invoke Section 2302(b)(8)(A) as a defense to a resulting employment action would embolden federal employees to disclose SSI and gravely endanger public safety. Information designated as SSI includes "[s]ecurity programs and contingency plans"; "[s]ecurity [d]irectives"; specifications of security equipment and procedures; "[v]ulnerability assessments"; methods used to detect threats; operational and technical details of particular security measures; security screening procedures; "[s]ecurity training materials"; "[i]dentifying information of certain transportation security personnel"; and lists of systems and assets "the incapacity or destruction of [which] would have a debilitating impact on transportation security." 49 C.F.R. 1520.5(b)(1)-(2), (4)-(5) and (7)-(12) (emphases omitted). Any of that information, if improperly disclosed, could present a serious threat to the security of the Nation's transportation network and put lives at risk.

Armed with such information, someone might, for example, gain the ability to circumvent existing security measures, evade existing threat-detection procedures, or pinpoint specific vulnerabilities in the na-

tional transportation infrastructure. As the Federal Circuit recognized, respondent's own disclosure of flights that would not be protected by federal air marshals "compromised flight safety," created a "threat to public safety," and "could have had catastrophic consequences." Pet. App. 8a. Even information that might not appear on its face to expose a security vulnerability (say, the fact that a particular federal air marshal will be on a particular flight) could potentially be exploited to create one (say, by interfering with the air marshal's ability to make the flight). It will not always be possible for the TSA to modify its plans in time to mitigate the disclosed vulnerability. Even when it is possible to do so, the effort may "force[] the Agency to reallocate scarce resources," *ibid.*, thereby diminishing the resources available in areas that the agency initially determined to present greter risks to public safety. And a disclosure of information about screening technology (such as the calibration of metal detectors), for example, would require major investments of time, resources, and infrastructure improvements to remedy; could take months, if not years, to complete; and would require considerable expenditure of federal funds.

The Federal Circuit attempted to downplay the impact of its decision by pointing out that the government may still "discipline employees who reveal SSI for personal gain or due to negligence, or who disclose information that the employee does not reasonably believe evidences a substantial and specific danger to public health or safety." Pet. App. 16a-17a. But that is cold comfort. SSI, by its very nature, concerns security matters. Employees will thus frequently be able to claim that they are publicly disclosing SSI in

an effort to expose flaws in transportation security. Many of those employees may later be deemed by the MSPB, or a court, to have had a "reasonabl[e] belie[f]" that the disclosure "evidences * * * a substantial and specific danger to public health or safety," 5 U.S.C. 2302(b)(8)(A)(ii), or another type of "reasonabl[e] belie[f]" that qualifies for protection under Section 2302(b)(8)(A). Even if some employees' disclosures are not ultimately deemed to be within the scope of Section 2302(b)(8)(A), the increased likelihood of that result will itself erode the SSI scheme's deterrent effect and encourage more disclosures, which are immediately harmful whether or not the responsible employee is eventually subject to disciplinary action.

3. Respondent's suggestion (Br. in Opp. 32) that the TSA is "try[ing] to circumvent whistleblower protections through regulation" is seriously misguided. The prohibition on public disclosure of air-marshal-deployment information has an obvious, legitimate, and compelling security rationale entirely unrelated to any potential desire by the agency to "conceal wrongdoing," *id.* at 31 (citation omitted). As the MSPB concluded, Pet. App. 50a-54a, and the Federal Circuit agreed, *id.* at 7a-9a, it was reasonable for the TSA to remove respondent for his dangerous disclosure of such information, even assuming his subjective motive for doing so was benign. See *id.* at 52a-53a (MSPB's determination that respondent's actions "could have created a significant security risk" and that he "did not exhibit the good judgment that the agency can legitimately expect of its law enforcement personnel"). If the Federal Circuit's decision is allowed to stand, however, the MSPB may well conclude

(as the concurring judge in the court of appeals apparently would, see *id.* at 18a) that the TSA must reinstate respondent to a position where he will again have access to SSI.

To the extent any concern exists that the TSA might apply Section 114(r) in an overbroad manner calculated to deter legitimate disclosures, Congress can address—and has, in fact, addressed—that concern. In 2009, Congress amended Section 114(r) to clarify that "[n]othing in this subsection, or any other provision of law, shall be construed to authorize the designation of information as sensitive security information" in order to "conceal a violation of law, inefficiency, or administrative error"; "prevent embarrassment to a person, organization, or agency"; "restrain competition"; or "prevent or delay the release of information that does not require protection in the interest of transportation security, including basic scientific research information not clearly related to transportation security." 49 U.S.C. 114(r)(4)(A)-(D); see American Communities' Right to Public Information Act, Pub. L. No. 111-83, § 561(c)(1), 123 Stat. 2182; see also 49 U.S.C. 40119(b) (similar limitations on the Department of Transportation's authority). Although that amendment postdates the disclosures at issue here, the regulation that prohibited respondent's disclosure of air-marshal-deployment information clearly was not enacted for any of those now-impermissible purposes. There is no doubt that such information "require[s] protection in the interest of transportation security," and the Federal Circuit agreed with the government that respondent's specific disclosure jeopardized flight safety. 49 U.S.C. 114(r)(4)(D); see Pet. App. 7a-9a. Respondent's seri-

ous breach of security protocol accordingly should not be immunized under Section 2302(b)(8)(A).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 2014

APPENDIX

1. 5 U.S.C. 2302 provides in pertinent part:

Prohibited personnel practices

* * * * *

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

* * * * *

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) any violation (other than a violation of this section) of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

* * * * *

2. 5 U.S.C. 2302 (2006) provided in pertinent part:

Prohibited personnel practices

* * * * *

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

* * * * *

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

* * * * *

3. 49 U.S.C. 114(r) provides in pertinent part:

Transportation Security Administration

* * * * *

(r) NONDISCLOSURE OF SECURITY ACTIVITIES.—

(1) IN GENERAL.—Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would—

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to the security of transportation.

(2) AVAILABILITY OF INFORMATION TO CONGRESS.—Paragraph (1) does not authorize information to be withheld from a committee of Congress authorized to have the information.

(3) LIMITATION ON TRANSFERABILITY OF DUTIES.—Except as otherwise provided by law, the Under Secretary may not transfer a duty or power under this subsection to another department, agency, or instrumentality of the United States.

(4) LIMITATIONS.—Nothing in this subsection, or any other provision of law, shall be construed to authorize the designation of information as sensitive security information (as defined in section 1520.5 of title 49, Code of Federal Regulations)—

(A) to conceal a violation of law, inefficiency, or administrative error;

(B) to prevent embarrassment to a person, organization, or agency;

(C) to restrain competition; or

(D) to prevent or delay the release of information that does not require protection in the interest of transportation security, including basic scientific research information not clearly related to transportation security.

4. 49 U.S.C. 114(s) (2000 & Supp. II 2002) provided in pertinent part:

Transportation Security Administration

* * * * *

(s) NONDISCLOSURE OF SECURITY ACTIVITIES.—

(1) IN GENERAL.—Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter

449 of this title if the Under Secretary decides that disclosing the information would—

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to the security of transportation.

(2) AVAILABILITY OF INFORMATION TO CONGRESS.—Paragraph (1) does not authorize information to be withheld from a committee of Congress authorized to have the information.

(3) LIMITATION ON TRANSFERABILITY OF DUTIES.—Except as otherwise provided by law, the Under Secretary may not transfer a duty or power under this subsection to another department, agency, or instrumentality of the United States.

5. 49 U.S.C. 40119(b) provides in pertinent part:

Security and research and development activities

* * * * *

(b) DISCLOSURE.—(1) Notwithstanding section 552 of title 5 and the establishment of a Department of Homeland Security, the Secretary of Transportation shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security

under this title if the Secretary of Transportation decides disclosing the information would—

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to transportation safety.

(2) Paragraph (1) of this subsection does not authorize information to be withheld from a committee of Congress authorized to have the information.

6. 49 U.S.C. 40119(b) (2000 & Supp. I 2001) provided in pertinent part:

Security and research and development activities

* * * * *

(b) DISCLOSURE.—(1) Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security or research and development activities under section 44501(a) or (c), 44502(a)(1) or (3), (b), or (c), 44504, 44505, 44507, 44508, 44511, 44512, 44513, 44901, 44903(a), (b), (c), or (e), 44905, 44912, 44935, 44936, or 44938(a) or (b) of this title if the Under Secretary decides disclosing the information would—

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to the safety of passengers in transportation.

(2) Paragraph (1) of this subsection does not authorize information to be withheld from a committee of Congress authorized to have the information.

7. 49 U.S.C. 40119(b) (2000) provided in pertinent part:

Security and research and development activities

* * * * *

(b) DISCLOSURE.—(1) Notwithstanding section 552 of title 5, the Administrator shall prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security or research and development activities under section 44501(a) or (c), 44502(a)(1) or (3), (b), or (c), 44504, 44505, 44507, 44508, 44511, 44512, 44513, 44901, 44903(a), (b), (c), or (e), 44905, 44912, 44935, 44936, or 44938(a) or (b) of this title if the Administrator decides disclosing the information would—

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to the safety of passengers in air transportation.

(2) Paragraph (1) of this subsection does not authorize information to be withheld from a committee of Congress authorized to have the information.

8. 49 C.F.R. 1520 provides in pertinent part:

PART 1520—PROTECTION OF SENSITIVE SECURITY INFORMATION

* * * * *

§ 1520.5 Sensitive security information.

(a) *In general.* In accordance with 49 U.S.C. 114(s), SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would—

(1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file);

(2) Reveal trade secrets or privileged or confidential information obtained from any person; or

(3) Be detrimental to the security of transportation.

(b) *Information constituting SSI.* Except as otherwise provided in writing by TSA in the interest of public safety or in furtherance of transportation secu-

rity, the following information, and records containing such information, constitute SSI:

(1) *Security programs and contingency plans.* Any security program or security contingency plan issued, established, required, received, or approved by DOT or DHS, including any comments, instructions, or implementing guidance, including—

(i) Any aircraft operator, airport operator, fixed base operator, or air cargo security program, or security contingency plan under this chapter;

(ii) Any vessel, maritime facility, or port area security plan required or directed under Federal law;

(iii) Any national or area security plan prepared under 46 U.S.C. 70103; and

(iv) Any security incident response plan established under 46 U.S.C. 70104.

(2) *Security Directives.* Any Security Directive or order—

(i) Issued by TSA under 49 CFR 1542.303, 1544.305, 1548.19, or other authority;

(ii) Issued by the Coast Guard under the Maritime Transportation Security Act, 33 CFR part 6, or 33 U.S.C. 1221 *et seq.* related to maritime security; or

(iii) Any comments, instructions, and implementing guidance pertaining thereto.

(3) *Information Circulars.* Any notice issued by DHS or DOT regarding a threat to aviation or maritime transportation, including any—

(i) Information circular issued by TSA under 49 CFR 1542.303, 1544.305, 1548.19, or other authority; and

(ii) Navigation or Vessel Inspection Circular issued by the Coast Guard related to maritime security.

(4) *Performance specifications.* Any performance specification and any description of a test object or test procedure, for—

(i) Any device used by the Federal Government or any other person pursuant to any aviation or maritime transportation security requirements of Federal law for the detection of any person, and any weapon, explosive, incendiary, or destructive device, item, or substance; and

(ii) Any communications equipment used by the Federal government or any other person in carrying out or complying with any aviation or maritime transportation security requirements of Federal law.

(5) *Vulnerability assessments.* Any vulnerability assessment directed, created, held, funded, or approved by the DOT, DHS, or that will be provided to DOT or DHS in support of a Federal security program.

(6) *Security inspection or investigative information.* (i) Details of any security inspection or investigation of an alleged violation of aviation, maritime, or rail transportation security requirements of Federal

law that could reveal a security vulnerability, including the identity of the Federal special agent or other Federal employee who conducted the inspection or audit.

(ii) In the case of inspections or investigations performed by TSA, this includes the following information as to events that occurred within 12 months of the date of release of the information: the name of the airport where a violation occurred, the airport identifier in the case number, a description of the violation, the regulation allegedly violated, and the identity of any aircraft operator in connection with specific locations or specific security procedures. Such information will be released after the relevant 12-month period, except that TSA will not release the specific gate or other location on an airport where an event occurred, regardless of the amount of time that has passed since its occurrence. During the period within 12 months of the date of release of the information, TSA may release summaries of an aircraft operator's, but not an airport operator's, total security violations in a specified time range without identifying specific violations or locations. Summaries may include total enforcement actions, total proposed civil penalty amounts, number of cases opened, number of cases referred to TSA or FAA counsel for legal enforcement action, and number of cases closed.

(7) *Threat information.* Any information held by the Federal government concerning threats against transportation or transportation systems and sources and methods used to gather or develop threat information, including threats against cyber infrastructure.

(8) *Security measures.* Specific details of aviation, maritime, or rail transportation security measures, both operational and technical, whether applied directly by the Federal government or another person, including—

(i) Security measures or protocols recommended by the Federal government;

(ii) Information concerning the deployments, numbers, and operations of Coast Guard personnel engaged in maritime security duties and Federal Air Marshals, to the extent it is not classified national security information; and

(iii) Information concerning the deployments and operations of Federal Flight Deck Officers, and numbers of Federal Flight Deck Officers aggregated by aircraft operator.

(iv) Any armed security officer procedures issued by TSA under 49 CFR part 1562.

(9) *Security screening information.* The following information regarding security screening under aviation or maritime transportation security requirements of Federal law:

(i) Any procedures, including selection criteria and any comments, instructions, and implementing guidance pertaining thereto, for screening of persons, accessible property, checked baggage, U.S. mail, stores, and cargo, that is conducted by the Federal government or any other authorized person.

(ii) Information and sources of information used by a passenger or property screening program or system, including an automated screening system.

(iii) Detailed information about the locations at which particular screening methods or equipment are used, only if determined by TSA to be SSI.

(iv) Any security screener test and scores of such tests.

(v) Performance or testing data from security equipment or screening systems.

(vi) Any electronic image shown on any screening equipment monitor, including threat images and descriptions of threat images for threat image projection systems.

(10) *Security training materials.* Records created or obtained for the purpose of training persons employed by, contracted with, or acting for the Federal government or another person to carry out aviation, maritime, or rail transportation security measures required or recommended by DHS or DOT.

(11) *Identifying information of certain transportation security personnel.* (i) Lists of the names or other identifying information that identify persons as—

(A) Having unescorted access to a secure area of an airport, a rail secure area, or a secure or restricted area of a maritime facility, port area, or vessel;

(B) Holding a position as a security screener employed by or under contract with the Federal government pursuant to aviation or maritime transportation security requirements of Federal law, where such lists are aggregated by airport;

(C) Holding a position with the Coast Guard responsible for conducting vulnerability assessments, security boardings, or engaged in operations to enforce maritime security requirements or conduct force protection;

(D) Holding a position as a Federal Air Marshal; or

(ii) The name or other identifying information that identifies a person as a current, former, or applicant for Federal Flight Deck Officer.

(12) *Critical aviation, maritime, or rail infrastructure asset information.* Any list identifying systems or assets, whether physical or virtual, so vital to the aviation, maritime, or rail transportation system (including rail hazardous materials shippers and rail hazardous materials receivers) that the incapacity or destruction of such assets would have a debilitating impact on transportation security, if the list is—

(i) Prepared by DHS or DOT; or

(ii) Prepared by a State or local government agency and submitted by the agency to DHS or DOT.

(13) *Systems security information.* Any information involving the security of operational or administrative data systems operated by the Federal government that have been identified by the DOT or DHS as

critical to aviation or maritime transportation safety or security, including automated information security procedures and systems, security inspections, and vulnerability information concerning those systems.

(14) *Confidential business information.* (i) Solicited or unsolicited proposals received by DHS or DOT, and negotiations arising therefrom, to perform work pursuant to a grant, contract, cooperative agreement, or other transaction, but only to the extent that the subject matter of the proposal relates to aviation or maritime transportation security measures;

(ii) Trade secret information, including information required or requested by regulation or Security Directive, obtained by DHS or DOT in carrying out aviation or maritime transportation security responsibilities; and

(iii) Commercial or financial information, including information required or requested by regulation or Security Directive, obtained by DHS or DOT in carrying out aviation or maritime transportation security responsibilities, but only if the source of the information does not customarily disclose it to the public.

(15) *Research and development.* Information obtained or developed in the conduct of research related to aviation, maritime, or rail transportation security activities, where such research is approved, accepted, funded, recommended, or directed by DHS or DOT, including research results.

(16) *Other information.* Any information not otherwise described in this section that TSA deter-

mines is SSI under 49 U.S.C. 114(s) or that the Secretary of DOT determines is SSI under 49 U.S.C. 40119. Upon the request of another Federal agency, TSA or the Secretary of DOT may designate as SSI information not otherwise described in this section.

(c) *Loss of SSI designation.* TSA or the Coast Guard may determine in writing that information or records described in paragraph (b) of this section do not constitute SSI because they no longer meet the criteria set forth in paragraph (a) of this section.

* * * * *

§ 1520.9 Restrictions on the disclosure of SSI.

(a) *Duty to protect information.* A covered person must—

(1) Take reasonable steps to safeguard SSI in that person's possession or control from unauthorized disclosure. When a person is not in physical possession of SSI, the person must store it a secure container, such as a locked desk or file cabinet or in a locked room.

(2) Disclose, or otherwise provide access to, SSI only to covered persons who have a need to know, unless otherwise authorized in writing by TSA, the Coast Guard, or the Secretary of DOT.

(3) Refer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS.

(4) Mark SSI as specified in § 1520.13.

(5) Dispose of SSI as specified in § 1520.19.

(b) *Unmarked SSI.* If a covered person receives a record containing SSI that is not marked as specified in § 1520.13, the covered person must—

(1) Mark the record as specified in § 1520.13; and

(2) Inform the sender of the record that the record must be marked as specified in § 1520.13.

(c) *Duty to report unauthorized disclosure.* When a covered person becomes aware that SSI has been released to unauthorized persons, the covered person must promptly inform TSA or the applicable DOT or DHS component or agency.

(d) *Additional Requirements for Critical Infrastructure Information.* In the case of information that is both SSI and has been designated as critical infrastructure information under section 214 of the Homeland Security Act, any covered person who is a Federal employee in possession of such information must comply with the disclosure restrictions and other requirements applicable to such information under section 214 and any implementing regulations.

§ 1520.11 Persons with a need to know.

(a) *In general.* A person has a need to know SSI in each of the following circumstances:

(1) When the person requires access to specific SSI to carry out transportation security activities approved, accepted, funded, recommended, or directed by DHS or DOT.

(2) When the person is in training to carry out transportation security activities approved, accepted, funded, recommended, or directed by DHS or DOT.

(3) When the information is necessary for the person to supervise or otherwise manage individuals carrying out transportation security activities approved, accepted, funded, recommended, or directed by the DHS or DOT.

(4) When the person needs the information to provide technical or legal advice to a covered person regarding transportation security requirements of Federal law.

(5) When the person needs the information to represent a covered person in connection with any judicial or administrative proceeding regarding those requirements.

(b) *Federal, State, local, or tribal government employees, contractors, and grantees.* (1) A Federal, State, local, or tribal government employee has a need to know SSI if access to the information is necessary for performance of the employee's official duties, on behalf or in defense of the interests of the Federal, State, local, or tribal government.

(2) A person acting in the performance of a contract with or grant from a Federal, State, local, or tribal government agency has a need to know SSI if access to the information is necessary to performance of the contract or grant.

(c) *Background check.* TSA or Coast Guard may make an individual's access to the SSI contingent upon satisfactory completion of a security background check or other procedures and requirements for safeguarding SSI that are satisfactory to TSA or the Coast Guard.

(d) *Need to know further limited by the DHS or DOT.* For some specific SSI, DHS or DOT may make a finding that only specific persons or classes of persons have a need to know.

* * * * *

§ 1520.17 Consequences of unauthorized disclosure of SSI.

Violation of this part is grounds for a civil penalty and other enforcement or corrective action by DHS, and appropriate personnel actions for Federal employees. Corrective action may include issuance of an order requiring retrieval of SSI to remedy unauthorized disclosure or an order to cease future unauthorized disclosure.

* * * * *

9. 49 C.F.R. 1520 (2002) provided in pertinent part:

PART 1520—PROTECTION OF SENSITIVE SECURITY INFORMATION

* * * * *

§ 1520.5 Records and information protected by others.

(a) *Duty to protect information.* The following persons must restrict disclosure of and access to sensitive security information described in § 1520.7 (a) through (g), (j), (k), and (m) through (r), and, as applicable, § 1520.7 (l) to persons with a need to know and must refer requests by other persons for such information to TSA or the applicable DOT administration:

(1) Each person employed by, contracted to, or acting for a person listed in this paragraph (a).

(2) Each airport operator under part 1542 of this chapter.

(3) Each aircraft operator under part 1544 of this chapter.

(4) Each foreign air carrier under part 1546 of this chapter.

(5) Each indirect air carrier under part 1548 of this chapter.

(6) Each aircraft operator under § 1550.5 of this chapter.

(7) Each person receiving information under § 1520.3 (d).

(8) Each person for which a vulnerability assessment has been authorized, approved, or funded by DOT, irrespective of the mode of transportation.

(b) *Need to know.* For some specific sensitive security information, the Under Secretary may make a finding that only specific persons or classes of persons have a need to know. Otherwise, a person has a need to know sensitive security information in each of the following circumstances:

(1) When the person needs the information to carry out DOT-approved, accepted, or directed security duties.

(2) When the person is in training to carry out DOT-approved, accepted, or directed security duties.

(3) When the information is necessary for the person to supervise or otherwise manage the individuals carrying to carry out DOT-approved, accepted, or directed security duties.

(4) When the person needs the information to advise the persons listed in paragraph (a) of this section regarding any DOT security-related requirements.

(5) When the person needs the information to represent the persons listed in paragraph (a) of this section in connection with any judicial or administrative proceeding regarding those requirements.

(c) *Release of sensitive security information.* When sensitive security information is released to unauthorized persons, any person listed in paragraph

(a) of this section or individual with knowledge of the release, must inform DOT.

(d) *Violation.* Violation of this section is grounds for a civil penalty and other enforcement or corrective action by DOT.

(e) *Applicants.* Wherever this part refers to an aircraft operator, airport operator, foreign air carrier, or indirect air carrier, those terms also include applicants for such authority.

(f) *Trainees.* An individual who is in training for a position is considered to be employed by, contracted to, or acting for persons listed in paragraph (a) of this section, regardless of whether that individual is currently receiving a wage or salary or otherwise is being paid.

§ 1520.7 Sensitive security information.

Except as otherwise provided in writing by the Under Secretary as necessary in the interest of safety of persons in transportation, the following information and records containing such information constitute sensitive security information:

(a) Any approved, accepted, or standard security program under the rules listed in § 1520.5(a)(1) through (6), and any security program that relates to United States mail to be transported by air (including that of the United States Postal Service and of the Department of Defense); and any comments, instructions, or implementing guidance pertaining thereto.

(b) Security Directives and Information Circulars under § 1542.303 or § 1544.305 of this chapter, and any comments, instructions, or implementing guidance pertaining thereto.

(c) Any selection criteria used in any security screening process, including for persons, baggage, or cargo under the rules listed in § 1520.5(a)(1) through (6).

(d) Any security contingency plan or information and any comments, instructions, or implementing guidance pertaining thereto under the rules listed in § 1520.5(a)(1) through (6).

(e) Technical specifications of any device used for the detection of any deadly or dangerous weapon, explosive, incendiary, or destructive substance under the rules listed in § 1520.5(a)(1) through (6).

(f) A description of, or technical specifications of, objects used to test screening equipment and equipment parameters under the rules listed in § 1520.5(a)(1) through (6).

(g) Technical specifications of any security communications equipment and procedures under the rules listed in § 1520.5(a)(1) through (6).

(h) As to release of information by TSA: Any information that TSA has determined may reveal a systemic vulnerability of the aviation system, or a vulnerability of aviation facilities, to attack. This includes, but is not limited to, details of inspections, investigations, and alleged violations and findings of

violations of 14 CFR parts 107, 108, or 109 and 14 CFR 129.25, 129.26, or 129.27 in effect prior to November 14, 2001 (see 14 CFR parts 60 to 139 revised as of January 1, 2001); or parts 1540, 1542, 1544, 1546, 1548, or § 1550.5 of this chapter, and any information that could lead the disclosure of such details, as follows:

(1) As to events that occurred less than 12 months before the date of the release of the information, the following are not released: the name of an airport where a violation occurred, the regional identifier in the case number, a description of the violation, the regulation allegedly violated, and the identity of the aircraft operator in connection with specific locations or specific security procedures. TSA may release summaries of an aircraft operator's total security violations in a specified time range without identifying specific violations. Summaries may include total enforcement actions, total proposed civil penalty amounts, total assessed civil penalty amounts, number of cases opened, number of cases referred to TSA or FAA counsel for legal enforcement action, and number of cases closed.

(2) As to events that occurred 12 months or more before the date of the release of information, the specific gate or other location on an airport where an event occurred is not released.

(3) The identity of TSA or FAA special agent who conducted the investigation or inspection.

(4) Security information or data developed during TSA or FAA evaluations of the aircraft operators and

airports and the implementation of the security programs, including aircraft operator and airport inspections and screening point tests or methods for evaluating such tests under the rules listed in § 1520.5(a)(1) through (6).

(i) As to release of information by TSA: Information concerning threats against transportation.

(j) Specific details of aviation security measures whether applied directly by the TSA or entities subject to the rules listed in § 1520.5(a)(1) through (6). This includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.

(k) Any other information, the disclosure of which TSA has prohibited under the criteria of 49 U.S.C. 40119.

(*l*) Any draft, proposed, or recommended change to the information and records identified in this section.

(m) The locations at which particular screening methods or equipment are used under the rules listed in § 1520.5(a)(1) through (6) if TSA determines that the information meets the criteria of 49 U.S.C. 40119.

(n) Any screener test used under the rules listed in § 1520.5(a)(1) through (6).

(o) Scores of tests administered under the rules listed in § 1520.5(a)(1) through (6).

(p) Performance data from screening systems, and from testing of screening systems under the rules listed in § 1520.5(a)(1) through (6).

(q) Threat images and descriptions of threat images for threat image projection systems under the rules listed in § 1520.5(a)(1) through (6).

(r) Information in a vulnerability assessment that has been authorized, approved, or funded by DOT, irrespective of mode of transportation.

RESPONDENT'S BRIEF

No. 13-894

IN THE
Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY,
Petitioner,
v.
ROBERT J. MACLEAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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QUESTION PRESENTED

Recognizing the crucial role federal employees play in uncovering unlawful, wasteful, and dangerous government activity, Congress has enacted strong protections for government whistleblowers. One such provision establishes that agencies may not retaliate against employees who disclose information revealing, among other things, "any violation of any law, rule, or regulation" or "a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A). There is an exception, however, for "disclosure[s] * * * specifically prohibited by law" or by certain Executive orders. *Id.*

By regulation, the Department of Homeland Security has prohibited the disclosure of certain unclassified information. *See* 49 C.F.R. Pt. 1520. The question presented is whether the agency may take action against an employee who, in order to prevent a substantial and specific danger to public safety, discloses that information.

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BRIEF FOR RESPONDENT

INTRODUCTION

This case shows why Congress created the whistleblower protections at issue here. Respondent Robert MacLean, a federal air marshal, learned that Petitioner Department of Homeland Security planned to save money by eliminating air-marshal protection on long-distance flights that required marshals to stay overnight in hotels, even though DHS had just discerned an imminent Al Qaeda plot targeting long-distance flights. MacLean brought this potentially catastrophic decision to the attention of his supervisor and the Inspector General, but they told him nothing could be done. As a last resort, MacLean went to a reporter, hoping to head off the dangerous policy before it went into effect. It worked. Members

of Congress criticized the agency's decision, and DHS rescinded the policy, acknowledging that it was "a mistake."

That did not stop DHS from eventually turning its sights on MacLean. When, two years later, it learned that MacLean was the source of this embarrassing revelation, DHS fired him, then issued an order declaring the information he had disclosed to be "Sensitive Security Information."

The law protects whistleblowers like MacLean from such retaliation so that Congress, and ultimately the public, can benefit from their willingness to bring to light serious problems that government agencies would prefer not to talk about. That is not to say Congress believes that government employees should be free to publicize *any* information. Congress recognized that the government must be able to protect some information no matter how strongly a government employee believes the public would benefit from its disclosure. But Congress also recognized that if agencies had the power to declare which pieces of information were off-limits to whistleblowers, they could use that authority to choke off the very safety valve that whistleblower protections seek to keep open.

So Congress placed that power elsewhere. The Whistleblower Protection Act shields those who disclose information concerning (among other things) "violation of *any law, rule, or regulation*," making an exception only if the disclosure is "specifically prohibited by *law*" or "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. § 2302(b)(8) (emphasis added). By distinguishing

"law" from "rule" and "regulation," Congress made clear that only a statute enacted by Congress or an order signed by the President suffices to deprive whistleblowers of protection. The purpose and history of the Act—not to mention common sense—explain why that is so: If agencies could regulate their way around the whistleblower protections meant to restrain them, those safeguards would have little value.

DHS thus attempts to do here exactly what Congress forbade—punish a whistleblower based on its own regulations. And it is trying to do so under exactly the circumstances Congress had in mind when withholding that power—an agency was embarrassed by the disclosure of information that neither Congress nor the President had declared off-limits to whistleblowers. This Court should not countenance the agency's effort to circumvent Congress's command.

STATEMENT

A. Whistleblower Protection Laws

In 1978, amidst ongoing expansion of the administrative state and mounting concern over concealed government misconduct, Congress recognized the limits of its own ability to uncover wrongdoing within "the vast Federal bureaucracy." S. Rep. No. 95-969, at 8 (1978). So it turned for help to those individuals best positioned to bring illegal, wasteful, and dangerous government activity to light: government employees. Congress understood, though, that employees who "summon[ ] the courage to disclose the truth" are often rewarded only with "harassment and abuse." *Id.* Encouraging employees to come forward, it recognized, would require "a means to assure them

that they will not suffer if they help uncover and correct administrative abuses." *Id.*

Congress began with the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. That law established the core protections for government whistleblowers. Over the years, Congress has continually strengthened those protections as agencies have predictably resisted them. In 1989, Congress unanimously passed the Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16. The WPA sought "to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government." *Id.* at § 2(b), 103 Stat. 16. Just five years later, Congress again reinforced whistleblower protections by unanimous vote. *See* An Act To Reauthorize The Office Of Special Counsel, And For Other Purposes, Pub. L. No. 103-424, 108 Stat. 4361 (1994).

Most recently, Congress passed the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465. This law again aimed "to reform and strengthen several aspects of the whistleblower protection statutes in order to achieve the original intent and purpose of the laws," and in particular to "overturn[ ] several court decisions that narrowed the scope of protected disclosures." S. Rep. No. 112-155, at 3-5 (2012). The Senate Report accompanying the law also emphasized that protecting whistleblowers helps protect the nation against terrorist threats: "In a post-9/11 world, we must do our utmost to ensure that those with knowledge of problems at our nation's airports, borders, law enforcement agencies, and nuclear facilities are able to reveal those problems without fear of retaliation or harassment." *Id.* at 1.

This case concerns one of the most important whistleblower protections established and continually reaffirmed through this series of laws, 5 U.S.C. § 2302(b)(8)(A).[1] That section prohibits agencies from taking specified actions, such as firing someone, in retaliation for:

> any disclosure of information by an employee * * * which the employee * * * reasonably believes evidences—
>
> (i) any violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs * * * .

§ 2302(b)(8)(A). The idea is simple: Except where Congress or the President has determined that the costs of any disclosure would outweigh its benefits, government employees should be encouraged to reveal illegal, dangerous, or grossly wasteful agency acts. And when they do so, the agencies that employ them should be prevented from retaliating.

Congress was mindful that agencies themselves would not always welcome whistleblowers' contributions to transparency, safety, and efficiency. Agencies and their officers often have strong incentives to conceal wrongdoing, and employees who expose that

---

[1] This provision was first enacted in the Civil Service Reform Act, but it is commonly referred to as part of the WPA, and this brief adopts that terminology.

misconduct are not always treated kindly, which is why whistleblowers need protection in the first place. *See* S. Rep. No. 95-969 at 8 ("Whistle blowers frequently encounter severe damage to their careers and substantial economic loss."). Congress therefore ensured that agencies could not regulate their way out of the public scrutiny whistleblower-protection laws facilitate. Although Congress considered enacting versions of the provision that would exempt disclosures "prohibited by law, rule or regulation," Congress settled on language exempting only those disclosures "specifically prohibited by law" or certain Executive orders. *Compare* H.R. 11280, 95th Cong. (2d Sess. 1978); S. 2640, 95th Cong. (2d Sess. 1978) *with* 5 U.S.C. § 2302(b)(8)(A). As the Conference Report on the very language enacted by Congress in this provision explained, "specifically prohibited by law * * * does *not* refer to agency rules and regulations." H.R. Rep. No. 95-1717, at 130 (1978) (Conf. Rep.) (emphasis added).

B. Sensitive Security Information Regulations

Regulations governing the disclosure of information related to air-transportation security predate the whistleblower protection statutes. *See, e.g.*, 14 C.F.R. Pt. 191 (1976). These regulations were originally promulgated by the Federal Aviation Administration and subsequently transferred to the jurisdiction of the Transportation Security Administration, which has been part of DHS since DHS's creation in 2002. *See* 67 Fed. Reg. 8340, 8351 (Feb. 22, 2002).

TSA's authority to promulgate the regulations at issue in this case stems from a statutory provision initially enacted in the 1974 Air Transportation Se-

curity Act, Pub. L. No. 93-366, § 316, 88 Stat. 417 (1974). That provision granted authority to the Federal Aviation Administration, but was transferred to the newly-created TSA as part of the Homeland Security Act of 2002, Pub. L. No. 107-296, Tit. IV, Subtit. A, § 403(a), 116 Stat. 2178 (2002). The resulting provision was codified at 49 U.S.C. § 114(r), and is referred to throughout this brief as § 114(r). It provides, as relevant:

> Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security * * * if the Under Secretary decides that disclosing the information would * * * be detrimental to the security of transportation.

49 U.S.C. § 114(r)(1)(C); *see also* 49 U.S.C. § 40119(b)(1).[2] Section 552 of title 5 is the Freedom of Information Act, and Congress included that language out of concern that ill-intentioned members of the public would gain access to sensitive information through FOIA requests. *See Public Citizen, Inc.* v. *FAA*, 988 F.2d 186, 194-96 (D.C. Cir. 1993) (analyzing the predecessor statute to § 114(r)).

Congress has amended § 114(r) several times since the WPA's enactment—including after September 11, 2001—never adding a similar "notwithstanding" clause to address the WPA. *See* Pet. Br. 2-4. It did, however, expressly forbid the agency from using

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[2] Section 40119(b) grants the Secretary of Transportation substantially the same authority that § 114(r) grants TSA. *See* Pet. Br. 2-4. Although § 40119(b) appears frequently in the proceedings below, MacLean follows DHS in citing to § 114(r).

§ 114(r) "to conceal a violation of law, inefficiency, or administrative error" or "to prevent embarrassment to a person, organization, or agency." § 114(r)(4); Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142 (2009). And Congress ensured that DHS could not argue that the Homeland Security Act somehow rendered the WPA inapplicable to the agency, specifying that "[n]othing in this Act shall be construed as exempting the Department from requirements * * * to provide whistleblower protections for employees of the Department (including pursuant to the provisions in section 2302(b)(8) * * *)." Homeland Security Act § 883.[3]

The regulations enacted under § 114(r) create a category of "Sensitive Security Information," or "SSI," and restrict its use and dissemination. *See* 49 C.F.R. Pt. 1520. SSI is not classified information; it can be shared with the over 60,000 TSA personnel and private employees of airlines and airports, from pilots to baggage handlers, without the need for a security clearance or even a background check. *See* Pet. Br. 6, 17; 49 C.F.R. §§ 1520.7, 1520.11(c).

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[3] When the Office of Law Revision Counsel subsequently codified this provision at 6 U.S.C. § 463, it changed "Act" to "chapter" because the Act was "principally classified" in Chapter 6. *See* Office of the Law Revision Counsel, United States Code, http://uscode.house.gov/browse.xhtml (Jump to: Title 6, Section 463). The actions of that administrative body do not, however, affect the actual scope of the original language Congress enacted and the President signed. *See Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 379-80 (1958) (where the Statutes at Large and the Code conflict "Congress has specifically provided that the underlying statute must prevail").

C. Underlying Facts

Robert MacLean was a public servant with a fourteen-year record of federal service. After four years' active duty in the Air Force, he worked as a border patrol agent from 1996 to 2001. C.A. App. A184. After September 11, 2001, MacLean volunteered to serve his country in a new way. He applied to work for the organization that became the Federal Air Marshals Service—a federal law-enforcement agency currently within TSA—and became a member of the Service's first post-9/11 graduating class. JA81-82.

As an air marshal, MacLean's job was "to detect, deter, and defeat hostile acts targeting U.S. air carriers, airports, passengers, and crews." *Federal Air Marshals,* TSA, *available at* http://www.tsa.gov/about-tsa/federal-air-marshals. Marshals operate independently and aim to blend in with ordinary travelers. *See id.* They are trained in "investigative techniques, criminal terrorist behavior recognition, firearms proficiency, aircraft specific tactics, and close quarters self-defense measures." *Id.* MacLean served without incident until 2003, compiling an "exemplary" record. Pet. App. 104a.

In late July of that year, DHS issued an emergency, non-public notice of a specific and imminent terrorist threat focused on long-distance flights—a more ambitious, broader-scale version of the 9/11 plot. Pet. App. 2a; JA16-17, 91-93. Every air marshal, including MacLean, was given an unprecedented face-to-face briefing about the threat. Pet. App. 2a; JA91-92. MacLean and the other marshals were informed about special measures being implemented to thwart the attack and were told to be especially on their guard. JA91-93.

But within 48 hours of that secret briefing, MacLean received a text message cancelling "all overnight missions." Pet. App. 75a; JA93-94.[4] The text message was not marked as sensitive information; it was unencrypted; and it was sent to MacLean's unsecure cell phone, not the secure personal digital assistant he had been provided for SSI transmission. *See* Pet. App. 2a; JA86-91, 93-94, 99-101. MacLean at first thought the message must have been a mistake. After all, TSA is statutorily required to station a marshal on flights that "present high security risks," and marshal deployment on "nonstop, long distance flights * * * should be a priority." 49 U.S.C. § 44917(a). The looming hijacking threat only made marshal coverage of long-distance flights all the more imperative.

After confirming that other marshals had received the same message, MacLean went to his supervisor to express his concern. Pet. App. 2a; JA95-96. The supervisor told him that overnight missions had been eliminated to save money on hotels, overtime, and travel allowances, and that "nothing could be done." Pet. App. 2a; JA30, 95. MacLean then called the Of-

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[4] DHS describes this message as specific to Las Vegas flights. *See* Pet. Br. 7. But although MacLean himself worked in the Las Vegas office, the message he received concerned *all* overnight flights. *See, e.g.*, Pet. App. 59a ("Las Vegas [Federal Air Marshals] were sent a text message that all RON (remain overnight) missions up to August 9 would be canceled."); 65a (explaining that MacLean was assigned to Las Vegas); 78a ("I knew there were Air Marshals across the country that were getting the same message."). That is why the ensuing press coverage, congressional uproar, and DHS rescission all addressed long-distance flights generally, not simply Las Vegas-based flights. *See* JA36-39, 50-53, 59-73.

fice of the Inspector General, as he was encouraged to do by posters on display throughout his office building. JA96-97. His call was transferred from one Inspector General field office to another, and he was ultimately advised to think about the "years left in [his] career" and "just walk away." JA97.

Only then did MacLean look outside for help. He firmly believed that the new policy was contrary to law and extraordinarily dangerous to public safety. *See* Pet. App. 53a-54a, JA101. And time was running out before it took effect. So MacLean blew the whistle. He contacted a reporter with a history of responsible reporting about TSA who maintained close connections with Congress, telling him about the plan to remove marshals from long-distance flights. *See* Pet. App. 2a; JA98, 121.[5]

When the story was published, congressional leaders reacted immediately. Pet. App. 2a. They expressed concern and even outrage about DHS's decision to pull air marshals from the most threatened

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[5] DHS describes these events in artificially nefarious terms, claiming that MacLean "testified that it did not matter to him, in formulating that scheme, whether the information he planned to reveal was SSI." Pet. Br. 8. But MacLean actually testified that "it did not matter" when he was discussing this question with his supervisor, who, of course, would be privy to the information anyway. *See* C.A. App. 283-84. Moreover, the Court of Appeals subsequently agreed that "it did not matter" whether agency regulations considered the information "SSI" if MacLean reasonably believed that information concerned "breaking the law and * * * endangering life." *Id.* at 284; Pet. App. 11a-17a. It is thus hardly fair to suggest that disregarding the SSI regulations would show bad faith when the question before this Court is whether the WPA *encourages* whistleblowers to disregard such regulations in certain situations.

flights "to save on hotels," and urged the agency to reconsider. JA68; *see also, e.g.*, JA59 (statement of Sen. Clinton); JA65 (statement of Sen. Lautenberg); JA72 (statement of Sen. Schumer); *see generally* Stephen Power, *Board Overseeing Air Marshals Asks to Divert Program's Funds*, The Wall Street Journal (July 31, 2003) ("Given new warnings from [DHS] about possible hijacking attempts, it is foolish to even consider cutting back the number of air marshals on commercial flights." (quoting Rep. Rogers (R-Ky)).

Within 24 hours, DHS rescinded the directive, announcing that it had been "premature and a mistake." JA155. Marshal coverage was uninterrupted, and the potential hijacking threat was averted. JA71-72. Senator Boxer specifically thanked the anonymous "air marshals who came forward and told the truth." JA41.

Initially, no one identified MacLean as the source of the anonymous disclosure, and he went back to work protecting air travelers. In the ensuing years, MacLean became actively involved with the efforts of the Federal Law Enforcement Officers Association to reform agency policies and practices that the Association believed hurt the air marshal program and endangered the public. Pet. App. 22a. As part of these efforts, MacLean appeared anonymously on a television news broadcast to criticize dress code policies that rendered marshals easily identifiable to would-be terrorists. *Id.*

As Congress had anticipated when it instituted whistleblower protections, DHS was less than pleased with the public criticism. When agency personnel recognized MacLean's voice during his televi-

sion appearance, the agency seized the opportunity to initiate an internal investigation. In May 2005, MacLean was interviewed by DHS investigators, and he confirmed that he had made the appearance in question. Pet. App. 2a-3a, 22a; JA23. MacLean was not directly asked about the July 2003 text message and ensuing news story, but nonetheless offered the details of his involvement in response to questions about his prior media contacts. Pet. App. 22a.

The information MacLean volunteered ended up costing him his job. In September 2005, DHS proposed to fire him on three grounds: (1) his television appearance had been unauthorized, (2) his release of information to the media was unauthorized, and (3) the text message he disclosed to the reporter contained SSI. *See id.* at 22a-23a. In April 2006, the agency sustained his removal on the third charge only. *See* Pet. App. 23a.

D. Procedural History

MacLean challenged his removal before the Merit Systems Protection Board on several grounds—chief among them, that the text message did not contain SSI and, even if it did, his disclosure was protected by the WPA. But before the MSPB could rule on these issues, TSA issued a two-page, ex parte order declaring the text message MacLean had disclosed years earlier to be SSI. *See MacLean* v. *DHS*, 543 F.3d 1145, 1149 (9th Cir. 2008).

MacLean appealed the order to the U.S. Court of Appeals for the Ninth Circuit, and the MSPB dismissed his initial action without prejudice pending the court's ruling. *See id.* Emphasizing the considerable deference afforded to an agency's interpretation of its own regulations, the Ninth Circuit upheld

DHS's determination that the text message contained SSI. *See id.* at 1150. It stressed, however, that MacLean could "still contest his termination before the MSPB, where he [could] raise the Whistleblower Protection Act" and "contend that the lack of clarity of the TSA's 'sensitive security information' regulations is evidence MacLean disseminated the information under a good faith belief the information did not qualify as sensitive security information." *Id.* at 1152.

So MacLean went back to the MSPB. The full Board eventually affirmed his removal. *See* Pet. App. 19a-55a. Clarifying an earlier ruling in this case, the Board held that because the SSI regulations had been "promulgated pursuant to an explicit Congressional mandate," those regulations qualify as an exception to the WPA. *Id.* at 32a.

The U.S. Court of Appeals for the Federal Circuit reversed. The court began by observing that "[t]he parties do not dispute that, in order to fall under the WPA's 'specifically prohibited by law' proviso, the disclosure must be prohibited by a statute rather than by a regulation." *Id.* at 12a. It thus found "the core of the disagreement" to be whether § 114(r) "specifically prohibits disclosure of information concerning coverage of flights by Marshals within the meaning of the WPA." *Id.* (internal quotation marks and alterations omitted).

The court explained that the "plain language" of § 114(r) "does not expressly prohibit employee disclosures, and only empowers the Agency to prescribe regulations prohibiting disclosure of SSI '*if the Secretary decides* disclosing the information would * * * be detrimental to public safety.' " *Id.* at 13a. (ci-

tation omitted; quoting 49 U.S.C. § 40119(b)). "Thus," the court continued, "the ultimate source of prohibition of Mr. MacLean's disclosure is not a statute but a regulation, which the parties agree cannot be 'law' under the WPA." *Id.* The court found further support for this conclusion in the legislative history showing that Congress wished to disable agencies from using their own regulatory authority, or broadly-worded grants of statutory discretion, to punish and intimidate whistleblowers. *Id.* at 13a-14a. And it contrasted § 114(r) with statutes that did have sufficient specificity to satisfy the WPA. *Id.* at 14a-15a. The court held out the possibility that some statutes could supply the requisite specificity even while directing an agency to promulgate the precise prohibitions, but found that "given the clarity of the statutory language and legislative intent behind the WPA's specificity requirement," § 114(r) did not qualify. *Id.* at 15a-16a.

The court concluded by debunking DHS's "parade of horribles." *Id.* at 16a. It observed that Congress remained free to enact specific prohibitions that would override the WPA. And it noted that its decision did not defeat the purpose of § 114(r) or nondisclosure statutes like it. Instead, the court explained that under its interpretation, § 114(r) accomplishes the ends for which it was enacted, enabling DHS to prohibit all sorts of disclosures—including the statute's "paramount goal" of blocking FOIA requests. *Id.* at 17a. But because § 114(r) lacked the specificity needed to overcome the WPA's focused protections, the court vacated the MSPB's decision and remanded for further proceedings. *Id.* at 17a-18a. DHS sought panel rehearing and rehear-

ing en banc. The agency's petition was denied without opinion and without dissent. Pet. App. 165a-66a.

SUMMARY OF THE ARGUMENT

1. The Court of Appeals correctly determined that DHS could not retaliate against MacLean for disclosing information embarrassing to the agency, so long as he held a reasonable belief that he was identifying a "specific danger to public health and safety," and neither a statute nor an Executive order prohibited his disclosure. 5 U.S.C. § 2302(b)(8)(A).

a. DHS maintains that in lieu of a statute or an Executive order, it could rely on its own regulations to punish MacLean's actions. The text of the WPA forecloses that argument. The key sentence of the WPA authorizes whistleblowers to disclose "any violation of any law, rule, or regulation," but allows punishment of such disclosures only if they are "specifically prohibited by law" or by certain Executive orders. *Id.* Under both precedent and logic, Congress's choice to distinguish between "law" and "law, rule, or regulation" makes clear that "prohibited by law" cannot mean "prohibited by regulation." The structure, purpose, and history of the WPA not only confirm that Congress intended that reading, but also explain why that is so. Whistleblower protections seek to prevent agencies from retaliating against employees who expose dangerous or illegal agency practices that the agencies themselves would prefer to keep secret. If agencies could use their own regulations to block such disclosures, then these protections would offer no protection at all.

DHS argues that the word "law" encompasses its regulations absent a clear showing of congressional intent to the contrary. Here, however, the showing is

crystal clear: "A statute that in one section refers to 'law, rule or regulation,' and in another section to only 'laws' cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places." *Dep't of Treasury, I.R.S.* v. *Fed. Labor Relations Auth.*, 494 U.S. 922, 932 (1990). That reasoning has all the more force where, as here, the purpose and history of the Act clearly explain why Congress chose to distinguish between laws it enacted and regulations an agency created. Nor does DHS help its case by observing that § 114(r) authorizes the regulations here. *All* valid regulations are authorized by a statute, yet remain regulations nonetheless. There is no sound basis to believe that a requirement for a specific statute or an Executive order can be fulfilled by a specific statute, an Executive order, or a certain variety of regulation.

b. Arguing in the alternative, DHS suggests that if a specific statutory prohibition is necessary, it has one in § 114(r). But that law does not prohibit anything at all—it merely allows DHS "to prescribe regulations prohibiting the disclosure of information." And even if § 114(r) were somehow a prohibition, its broad authorization for TSA to shield information if the agency decides disclosure would be "detrimental to the security of transportation" could not possibly qualify as the *specific* prohibition the WPA requires. Preventing occurrences it deems "detrimental to the security of transportation" is, after all, little more than a restatement of the *Transportation Security* Administration's overall mission.

DHS does not try to explain how the actual words of § 114(r) could "specifically prohibit" MacLean's revelations, or anything else. It instead examines how FOIA affected non-disclosure statutes that pre-

dated FOIA, citing *FAA* v. *Robertson*, 422 U.S. 255 (1975). *Robertson*, however, relied entirely on the Court's understanding of FOIA's legislative history and purpose. Because FOIA and the WPA do not share the same purpose or history, *Robertson* and the other FOIA-related analysis DHS invokes say little about how this Court should interpret the WPA—much less how § 114(r) could do something its text plainly does not do.

2. DHS's policy arguments cannot substitute for statutory authority. MacLean agrees with DHS that the WPA strikes a considered balance between the benefits of allowing whistleblowers to reveal agency misdeeds and the need to keep some information secret no matter how strongly a would-be whistleblower believes it should be disclosed. Where they part company is with DHS's notion that an agency itself can determine where that balance lies. Congress chose *not* to delegate that power to the agencies, reserving it to itself and the President. There is nothing problematic about that; the classification system established by Executive order will continue to bar employees from revealing the nation's vital secrets, and Congress will continue to exempt other information from the WPA as it sees fit. If DHS wants to put more of its own information entirely off-limits, it need only persuade Congress or the President that doing so is in the country's best interest. What the agency bureaucracy cannot do is use its own regulations to hide mistakes that elected officials would prefer to see revealed and corrected.

ARGUMENT

I. THE WHISTLEBLOWER PROTECTION ACT BARS THE AGENCY FROM RETALIATING AGAINST MACLEAN.

Assuming—as the MSPB did—that MacLean "reasonably believe[d]" he was revealing a terrible mistake that posed "a substantial and specific danger to public * * * safety," DHS may take action against MacLean only if his disclosure was "specifically prohibited by law." 5 U.S.C. § 2302(b)(8)(A). The Court of Appeals correctly concluded that it was not.

A. DHS Cannot Use Its Own Regulations to Create Exceptions to the WPA.

1. **Text.** In this Court, DHS primarily argues that its own regulations provide the specific prohibition required by the WPA. The plain text of the WPA forecloses that argument. The phrase "law, rule, or regulation" appears more than 20 times throughout the WPA—no fewer than seven times in § 2302(b) alone. *See* §§ 2302(b)(1)(E), (6), (8)(A)(i), (8)(B)(i), (9)(A), (12), (13). By contrast, Congress chose not to provide whistleblower protections only where revealing information is "specifically prohibited by law" or certain Executive orders. § 2302(b)(8)(A). The two different phrases even appear in the same sentence: The WPA protects a disclosure of "any violation of any *law, rule, or regulation* * * * if such disclosure is not specifically prohibited by *law*." *Id.* (emphases added).

Congress's repeated reference to "law, rule, or regulation" shows that when "law" stands in isolation, it does not include rules and regulations. As this Court has explained, a "statute that in one section refers to 'law, rule or regulation,' and in another section to only 'laws' cannot, unless we abandon all pretense at pre-

cise communication, be deemed to mean the same thing in both places." *Dep't of Treasury,* 494 U.S. at 932.

The same conclusion also follows from the more general principle that "where Congress includes particular language in one section of a statute but omits it in another * * * it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States,* 464 U.S. 16, 23 (1983) (internal quotation marks omitted). Where, as here, the variation occurs within a single sentence, it becomes even clearer that the two phrases cannot have the same meaning.

Structure. The WPA's structure further confirms that "law" does not, in this context, include regulations. The WPA establishes a general rule that agencies may not punish whistleblowers' disclosures, then enumerates two specific exceptions: Employees may be disciplined for disclosing information "specifically prohibited by law" or "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." § 2302(b)(8)(A). If the word "law" in the first exception had a broad, general meaning such as "any legally-binding authority," the second exception would be superfluous. Executive orders—like rules and regulations—often have the force of law. *See, e.g., Chrysler,* 441 U.S. 304-12 (examining whether an Executive order and a regulation had the force of law); *HHS* v. *FLRA,* 844 F.2d 1087, 1096 (4th Cir. 1988) ("A Presidential order may have the force and effect of law when it is issued pursuant to statutory mandate or a delegation from Congress of lawmak-

ing authority.").[6] And there is no reason to doubt that the types of Executive orders contemplated by the WPA have the force of law, given the President's ample constitutional and statutory authority to protect secrets in national defense and foreign affairs. *See generally Dep't of Navy* v. *Egan*, 484 U.S. 518, 527-28 (1988).

The WPA's separate enumeration of certain Executive orders thus indicates that the statute uses "law" in a sense that does not encompass such orders. Statutes (and the judicial decisions interpreting them) surely qualify as "law." But to ensure the WPA also exempted another legally-binding authority—the specified Executive orders—Congress provided a separate exception. And because Congress provided one such exception, there is no basis to infer another exception for regulations. *See TRW Inc.* v. *Andrews*, 534 U.S. 19, 28-29 (2001) (" 'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.' " (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980))); *Comm'r* v. *Clark*, 489 U.S. 726, 739 (1989) ("In construing provisions * * * in which a general statement of policy is qualified by an exception, we usually

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[6] DHS suggests that *Chrysler* shows Executive orders do not always qualify as law. *See* Pet. Br. 25. That is true, but *Chrysler* also shows that regulations do not always qualify as law, and in fact concluded that the regulation in question lacked the force of law. *See* 441 U.S. at 304-12. *Chrysler* thus cannot support the theory that Congress listed Executive orders but not regulations in § 2302(b)(8)(A) because Congress was concerned that only Executive orders, and not regulations, might lack the force of law.

read the exception narrowly in order to preserve the primary operation of the provision").

Purpose. That the WPA excludes regulations becomes clearer still "considering the statute's purpose and context." *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 486 (2006); *see Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1169-70 (2014) (rejecting, in light of the statute's purpose "to ward off another Enron debacle," an interpretation that would have narrowed the whistleblower provision of the Sarbanes-Oxley Act). The WPA, at its core, forms a check on the predictable tendency of bureaucrats to protect themselves from embarrassment. Section 2302(b)(8) applies to employees of an "agency" or "government corporation." 5 U.S.C. § 2302(a). It restricts those agency employees from taking "a personnel action" against another employee (or job applicant) for revealing abuses that the public would want to know about, but which would embarrass the agency's management, such as "gross mismanagement," "gross waste of funds," and endangering public safety. § 2302(b)(8)(A)(ii). The statute's text thus makes plain that the "purpose of the WPA" is to allow employees to make such disclosures "without fearing retaliatory action by their supervisors or those who might be harmed by the disclosures." *Willis* v. *Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998).

If, however, an agency's management could use the agency's regulatory powers to prohibit such disclosures, it could close off the very openness the WPA seeks to create. Congress therefore kept the power to create exceptions to whistleblower protections for itself and the President, and did not allow agencies to use their regulatory authority to the same end. That choice helps ensure that whistleblowers can bring to light waste, fraud, abuse, and threats to public safety without fear of re-

prisal from their agencies. *See* S. Rep. No. 95-969, at 8 (Because "often the whistleblower's reward for dedication to the highest moral principles is harassment and abuse * * * protecting [whistleblowers] is a major step toward a more effective civil service.").

Moreover, the WPA qualifies as a remedial statute intended to solve the problem of agencies stifling employees who would reveal their misdeeds; it therefore "should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes." *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002) (internal quotation marks omitted). This Court has applied that well-established canon to protect employees from retaliation for their disclosures before. *See NLRB* v. *Scrivener*, 405 U.S. 117, 122-24 (1972) ("the approach * * * generally has been a liberal one in order fully to effectuate the section's remedial purpose"). Reading the WPA with an eye toward its remedial purpose is vital to achieving its ends, because if would-be whistleblowers cannot confidently rely on the Act's protections, they will never come forward in the first place. As a recent Senate report explains: "It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward." S. Rep. No. 112-155, at 5.

Of course, "no legislation pursues its purposes at all costs," *Rodriguez* v. *United States*, 480 U.S. 522 525-26 (1987). But here the limits Congress intended appear on the WPA's face: The law expressly states that Congress and the President can place information entirely outside the would-be whistleblower's purview. Expanding that discretion to agencies would impose a new, atextual limit on the WPA, and affirmatively un-

dermine its purpose by giving agencies the key to unlock the restraints intended to bind them. After all, if Congress believed that agencies should be the ultimate arbiters of what information government employees can disclose, protecting agency whistleblowers would be unnecessary.

History. The legislative history clearly shows that Congress did not intend "specifically prohibited by law" to mean "specifically prohibited by regulation." The conference report—examining the final language enacted by both Houses and signed by the President—said so in no uncertain terms:

> The reference to disclosures specifically prohibited by law is meant to refer to statutory law and court interpretations of those statutes. It does not refer to agency rules and regulations.

H.R. Rep. No. 95-1717, at 130.

Congress came to that conclusion quite deliberately. The Carter administration's initial draft of what became § 2302(b)(8) excluded disclosures prohibited by "law, rule or regulation." H.R. 11280, 95th Cong. (2d Sess. 1978); S. 2640, 95th Cong. (2d Sess. 1978). The Senate, however, removed the references to "rule or regulation." As its committee report explained, "there was concern that the limitation of protection in [the original draft] to those disclosures 'not prohibited by law, rule or regulation,' would encourage the adoption of internal procedural regulations against disclosure, and thereby enable an agency to discourage an employee from coming forward with allegations of wrongdoing." S. Rep. No. 95-969, at 21. The House agreed that "rule or regulation" should be removed. *See* H.R. Rep. No. 95-1403, at 146 (1978).

Even absent explanations why Congress has removed particular language from a draft bill, this Court consistently rejects efforts to read back into a statute the language that Congress culled. *See, e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (internal quotation marks omitted). Here, Congress not only removed "regulation" from the statute, its members explained that it did so for the exact reason at issue in this case: to prevent agencies from regulating their way around whistleblower protections.

The subsequent Congresses that amended the whistleblower protection laws also operated on the understanding that "law" does not include regulations. In 1989, Congress amended § 2302(b)(8)(A) to expand its protections. *See* Whistleblower Protection Act § 4. These amendments left "specifically prohibited by law" unchanged, but the committee reports leading up to them reaffirm that this language means "barred by *statute* or by executive order due to national security considerations." H.R. Rep. No. 100-274, at 18 (1987); H.R. Rep. No. 99-859, at 16 (1986) (emphasis added). In 1994, Congress again expanded whistleblower protections, and again a committee report reaffirmed that "the only restrictions [on disclosures] are for classified information or material the release of which is specifically prohibited by *statute*." H.R. Rep. No. 103-769, at 18 (1994) (emphasis added). Most recently, Congress enacted the Whistleblower Protection Enhancement Act of 2012. It amended § 2302(b)(8)(A) so that it would protect employees revealing "*any* violation of a law, rule, or regulation," rather than the previous "*a*

violation of a law, rule, or regulation."[7] Once again a committee explained that "specifically prohibited by law" excludes regulations, this time quoting earlier legislative history. *See* S. Rep. No. 112-155, at 4 (" 'The only restrictions are for classified information or material the release of which is specifically prohibited by statute.' ") (quoting H.R. Rep. No. 103–769, at 18). Although they cannot change the meaning of words enacted in 1978, "the views of a Congress engaged in the amendment of existing law as to the intent behind that law are 'entitled to significant weight.' " *Bufferd* v. *Comm'r*, 506 U.S. 523, 530 n. 10 (1993) (quoting *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980)). It is thus worth considering that for 35 years Congress has amended the whistleblower statutes multiple times, and each time with the consistent understanding that § 2302(b)(8)(A) does not recognize regulatory prohibitions as exceptions to the WPA.

Moreover, in 1993 the MSPB—the agency responsible for adjudicating WPA cases—recognized "that the statutory language, coupled with the legislative history of the * * * WPA, evidences a clear legislative intent to limit the term 'specifically prohibited by law' in section 2302(b)(8) to statutes and court interpretations of those statutes." *Kent* v. *Gen. Servs. Admin.*, 56 M.S.P.R. 536, 542–43 (1993) (rejecting agency contention that statutorily authorized regulations with "the force and effect of law" qualify as an exception to the WPA). Thus although Congress has amended the

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[7] Congress made this change to underscore "the breadth of the WPA's protections" and to stress "the intentionally broad scope of protected disclosures." S. Rep. No. 112-155, at 8. Like DHS, MacLean cites to the current version of the law. *See* Pet. Br. 9 n.1.

WPA several times to reverse MSPB and Federal Circuit decisions that improperly narrowed whistleblower protections, *see supra* at 4, it had no need to amend this portion of the Act, because it knew the MSPB would enforce that part of the law consistent with its intent. *Cf. Sebelius* v. *Auburn Reg'l Med. Center*, 133 S. Ct. 817, 827-28 (2013) ("When Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." (quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) (alteration omitted)).[8]

2. DHS argues that absent a " 'clear showing of contrary legislative intent,' " the word "law" encompasses regulations. Pet. Br. 20 (quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295 (1979)). MacLean has no quarrel with that proposition. But for all the reasons just given, the showing of legislative intent here could scarcely be clearer. So clear, in fact, that DHS did not even try to convince the Court of Appeals otherwise, telling it:

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[8] When Congress enacted the Whistleblower Protection Enhancement Act of 2012, the MSPB had issued its decision in this case, receding from *Kent*. *See* Pet. App. 19a. But Congress had no need to correct that decision, because it was under review by the Court of Appeals, where DHS had conceded that agency regulations did not satisfy the "specifically prohibited by law" requirement. *See infra* at 27-28; 158 Cong. Rec. E1664-01 (2012) (Statement of Rep. Platts) (urging "the Federal Circuit" not to "broaden[] the 'prohibited by law' exemption" to include SSI regulations, and reminding the court that "[p]rohibited by law has long been understood to mean statutory law and court interpretations of those statutes, not * * * agency rules and regulations").

> Amici argue that in order to exempt certain disclosures from WPA protection, "Congress must have explicitly prohibited such a disclosure via legislative enactment." Am. Br. at 9. *We do not disagree.* The only dispute is whether 49 U.S.C. § 40119 serves as that legislative enactment.

Gov't C.A. Br. at 46-47 (emphasis added). *See also* C.A. Oral Arg. Rec. 22:33-23:17 (Question: "I thought I understood your brief to concede that that can't be a rule or regulation, it means statute. Am I wrong?" Answer: "You're not wrong your honor. I'll be as clear as I can. '*Specifically prohibited by law' here means statute.*") (emphasis added).[9]

DHS's concession was wise. The last time an agency told this Court that "laws" and "law, rule, or regulation" meant the same thing in a statute where both appeared side-by-side, the Court rejected the argument as "simply contrary to any reasonable reading of the statutory text." *Dep't of Treasury*, 494 U.S. at 932. And here the Court also has the benefit of legislative history stating in the plainest possible terms that "specifically prohibited by

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[9] The Court of Appeals accepted that concession. *See* Pet. App. 12a ("The parties do not dispute that, in order to fall under the WPA's 'specifically prohibited by law' proviso, the disclosure must be prohibited by a statute rather than by a regulation."). DHS claims the court nonetheless passed upon the question because it suggested, in a single sentence of dicta, that other regulations could satisfy the WPA. *See* Pet. Reply Br. 10 (quoting Pet. App. 15a ("Regulations promulgated pursuant to Congress's express instructions would qualify as specific legal prohibitions.")). None of the cases DHS now cites, *see* Pet. Br. 19 n.3, establish that this Court must consider a previously-conceded argument under these circumstances. The Court is free to decide only the question actually examined below: whether § 114(r) specifically prohibits MacLean's disclosure. *See infra* at 35-47.

law is meant to refer to statutory law and court interpretations of those statutes. It does not refer to agency rules and regulations." H.R. Rep. No. 95-1717, at 130. In short, whatever showing *Chrysler* requires, it is more than satisfied here.

DHS cannot change this by appealing to capacious dictionary definitions of "law." *See* Pet. Br. 20. Those definitions help explain why *Chrysler* presumes that the term typically includes regulations. But they should not be double-counted in examining whether a particular statute overcomes that presumption. Here the text, structure, purpose, and history of the WPA all show that Congress could not have meant "law" to be synonymous with "law, rule, or regulation." *See supra* at 19-27. In such circumstances, appeals to general definitions found in dictionaries have little force. *See, e.g.*, *Dolan*, 546 U.S. at 486 (rejecting reliance on dictionary definition where statutory context indicated that word did not "extend to the outer limits of its definitional possibilities"). Indeed, Congress could not have understood "law" in the WPA to mean, for example, "[t]he body of rules governing the affairs of man within a community." Pet. Br. 20 (quoting *American Heritage Dictionary of the English Language* 741 (1976)). Such definitions sweep so broadly as to cover any agency directive prohibiting disclosures. But if every memo, order, and policy forbidding embarrassing revelations sufficed to render a disclosure "specifically prohibited by law," the WPA would protect few if any whistleblowers.

3. DHS mainly contends that "specifically prohibited by law" covers some, but not all, regulations. *See* Pet. Br. 22-28. That contention fails at every level of analysis.

Text. Whatever else may be said for DHS's position, it plainly has no basis in the statutory text. Absent the clear juxtaposition of "law" and "law, rule, or regulation" in the WPA, "law" could include both statutes and regulations, as *Chrysler* and DHS's dictionary definitions indicate. But with that juxtaposition, the statute makes clear that "law" and "regulation" are distinct categories, as *Department of Treasury* shows. There is no textual indication whatsoever that "law" is distinct from "regulation," yet nonetheless includes some unspecified subset of regulations.

DHS points out that in *Department of Treasury*, the Court found it "a permissible (though not an inevitable) construction of the statute that the term 'applicable laws' * * * applies to some, but not all, rules and regulations." 494 U.S. at 932-33. That makes sense in that context; "applicable laws" could, for example, mean some but not all statutes and some but not all regulations. But where, as here, the contrast is solely between "law" and "law, rule, or regulation," it is difficult to see what "law" standing alone could signify other than "law" but not "rule" or "regulation." That leaves "law" to mean exactly what the Conference Report says it means: "statutory law and court interpretations of those statutes" but not "agency rules and regulations." H.R. Rep. No. 95-1717, at 130.[10]

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[10] *Department of Treasury* also explained that "applicable" did not cause "laws" to mean "*all* rules and regulations," because the statute sometimes used the phrase "applicable laws, rules, and regulations." 494 U.S. at 932. That "applicable" could not somehow *expand* the scope of "laws" to cover all rules and regulations does not, however, mean that "applicable" did not *modify* "laws" so that "applicable laws" means something such as "applicable statutes and applicable regulations." *See id.* at 932-33.

It also adds nothing to suggest—as DHS does—that the presence of "rule" in the statutory phrase "law, rule, or regulation" muddies the waters. *See* Pet. Br. 23-24. There is no dispute that the categories of rule and regulation sometimes overlap, just as there is no dispute that law and regulation sometimes overlap. The point here is that using only "law" in one place and consistently using "law, rule, and regulation" elsewhere shows that *in this statute* "law" means something different from both rule and regulation—exactly as it did in *Department of Treasury*, which also distinguished "law" from "law, rule, and regulation." *See* 494 U.S. at 931.

Structure. The statutory context offers no support for DHS's view. The agency asserts that § 114(r) required it to issue the regulations in question. *See* Pet. Br. 23-25. Whether that is so has nothing to do with whether Congress intended those regulations to be exceptions to whistleblower protections. Congress enacted § 114(r) for several reasons; most obviously, the first six words of the statute allow DHS to promulgate regulations that will defeat FOIA requests. *See* § 114(r)(1) ("Notwithstanding Section 552 of Title 5 * * * ."). Section 114(r) also enables DHS to prohibit—and punish—employee disclosures for personal gain, inadvertence, or any other reason not protected by the WPA. But nothing in § 114(r) suggests that it requires DHS to promulgate regulatory exceptions to whistleblower protections. Nor does describing the regulations here as "congressionally mandated" imply that they would qualify as exceptions to the WPA when other regulations would not. Every valid regulation derives from a congressional grant of authority, often using the same mandatory language found in § 114(r)(1). *See, e.g.*, *Young* v. *Cmty. Nutrition Inst.*, 476 U.S. 974, 979-81

(1986) (deferring to FDA's interpretation of statute directing that it "shall promulgate regulations" concerning food safety to mean that the agency shall promulgate those regulations to the extent it finds necessary).

DHS confuses the issue by discussing it in the context of whether a particular regulation has the force of law under *Chrysler*. *See* Pet. Br. 21-23. In that case, Chrysler argued that the Trade Secrets Act barred the government from disclosing the company's business information in response to a FOIA request. The court of appeals had rejected Chrysler's position, because the Trade Secrets Act allows disclosures that are "authorized by law," and an agency regulation allowed the disclosure. *See* 441 U.S. at 294-95. This Court first asked whether *any* regulatory authorization could qualify as "authorized by law" in the context of that statute. Finding nothing like the textual and contextual indicia present in the WPA, the Court answered that preliminary question by holding that it was possible for regulations to satisfy the Trade Secrets Act's "authorized by law" requirement. *See id.* at 295-301. The Court then asked whether the *particular* regulation at issue did so. *Id.* at 301. In undertaking that second inquiry, the Court examined whether the regulation had several characteristics necessary to give it "the force and effect of law," including "whether the grant of [statutory] authority contemplates the regulations issued." *Id.* at 301, 308. But whether DHS's regulations could surmount the second step of *Chrysler*'s inquiry has nothing to do with whether they get past the first. If the WPA does not recognize any regulation as a valid limit on whistleblower protections—and it does not—then the particular characteristics of DHS's regulations are irrelevant.

Purpose. DHS finds it inconsistent with "language and logic" that a regulatory prohibition would not satisfy the WPA's "specifically prohibited by law" requirement even if a statute told the agency exactly what to prohibit. Pet. Br. 24. But there is nothing logically or linguistically problematic about a statute that does not count regulations as "law" refusing to recognize any regulation as law. Nor does that present a practical problem. A Congress that took the trouble to determine exactly what information should be off-limits to whistleblowers could just issue the requisite prohibition itself. And a Congress that wished to delegate to an agency the task of identifying that information could just authorize the agency to prohibit disclosures "notwithstanding the WPA," just as § 114(r) overrides FOIA by allowing TSA to prohibit disclosures "notwithstanding" that statute.

Moreover, the two cases on which DHS principally relies further illustrate why the WPA's purpose militates against reading it to allow regulations to trump its protections. As just discussed, *Chrysler* holds that the Trade Secrets Act allows certain regulations to authorize disclosures that would otherwise be prohibited under that Act. In that case, the Court explained that the Act "was primarily concerned with unauthorized disclosure of business information by feckless or corrupt revenue agents." 441 U.S. at 296. The Act's purpose of preventing rogue employees from revealing trade secrets for personal gain thus would not be impaired by an agency's decision to allow beneficial disclosures of certain classes of information. *See id.* at 296-300. The WPA, by contrast, is founded on the opposite premise: Individual employees *should* disclose some information even if that would make them rogues in the eyes of the federal bureaucracy. *See supra* at 22.

Department of Treasury illustrates a different point. In that case, the Court chose not to resolve the question whether "applicable law" could cover some regulations. *See supra* at 30-31. Instead, the Court left it up to the FLRA to determine whether "that extension should be made," after which courts could review the agency's determination under the deferential *Chevron* standard. 494 U.S. at 933. Given that Congress had assigned administration of the statute in question to the FLRA, that flexibility made sense. There is no reason to adopt a similarly lenient approach to interpreting the WPA, because DHS cannot plausibly claim *Chevron* deference for its interpretation of that statute. And DHS does not help its case by emphasizing that TSA is the assigned "expert" in determining what information is " 'detrimental to the security of transportation.' " Pet. Br. 17 (quoting § 114(r)(1)(C)). The notion that TSA could take the wide latitude accorded to expert agencies in other contexts and use it to define what information is exempt from whistleblower protections is anathema to the WPA's purpose of restraining agencies.

History. The use of legislative history has been criticized as "looking over a crowd and picking out your friends." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (internal quotation marks omitted). In this case, however, the agency has no friends in the crowd. DHS cites the conference report, which shows that Congress enacted the House's proposed "specifically prohibited by law" rather than the Senate's proposed "specifically prohibited by statute," in § 2302(b)(8)(A). *See* Pet. Br. 26. But both the House and the Senate came to those proposals by deleting "rule or regulation" from the initial draft of that provision. *See supra* 24. And the same conference report

DHS cites could not more clearly state that "specifically prohibited by law * * * does not refer to agency rules and regulations." H.R. Rep. No. 95-1717, at 130. To the extent Congress's use of "law" instead of "statute" was anything but stylistic, the conference report shows that Congress used "law" in order to refer both "to statutory law *and* court interpretations of those statutes." *Id.* (emphasis added).

DHS cannot explain that language away by citing congressional concerns with "internal procedural regulations against disclosure" and regulations "specif[ying] which agency employ[ee]s can talk to the press." Pet. Br. 27 (internal quotation marks, citation, and added emphasis omitted). Those statements help explain *why* Congress chose to exclude regulations from WPA exemptions. But they provide no reason to believe the particular types of regulation named were the only types of regulation Congress feared. And even if they were, that would not change the fact that Congress sought to defeat the threat of certain regulations by excluding all regulations, as it has consistently affirmed. *See supra* at 24-27.

B. Section 114(r) Does Not "Specifically Prohibit" MacLean's Disclosure.

DHS argues in the alternative that even if its regulations do not create an exception to whistleblower protections, MacLean's disclosure was "specifically prohibited" by § 114(r) itself. *See* Pet. Br. 28-34. To succeed in this fallback argument, DHS must show both that § 114(r) "prohibited" MacLean's disclosure and that it did so "specifically." *See Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) ("It is * * * a cardinal principle of statutory construction that we must give effect, if possible,

to every clause and word of a statute.") (internal quotation marks omitted). The agency does neither.

1. Section 114(r)(1) provides, as relevant:

> IN GENERAL.--Notwithstanding section 552 of title 5, the Under Secretary [of TSA] shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security * * * if the Under Secretary decides that disclosing the information would—
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> * * *
>
> (C) be detrimental to the security of transportation.[11]

As the Court of Appeals explained, that language does not prohibit anything; it "only empowers the Agency to prescribe regulations prohibiting disclosure." Pet. App. 13a. "Thus, the ultimate source of the prohibition of MacLean's disclosure is not a statute but a regulation." *Id.* Put another way, MacLean's disclosure could not possibly have contravened any prohibition in § 114(r) (since there are no prohibitions in the statute), which is presumably why the agency cited its own regulations—not this statute—as the basis for firing him. *See* Pet. App. 156a-57a.

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[11] Section 114(r)(1) also authorizes regulations prohibiting the disclosure of two other categories of information. Section 114(r)(1)(A) addresses disclosures that would constitute "an unwarranted invasion of personal privacy" and § 114(r)(1)(B) addresses trade secrets and financial information. DHS seeks rhetorical support by describing § 114(r) as concerning "three particular categories of information." *See* Pet. Br. 20. But the agency does not contend—nor could it plausibly do so—that § 114(r)(1)(A) or § 114(r)(1)(B) applies to MacLean's disclosure. And whether those provisions specifically prohibit other, unrelated disclosures has no bearing on whether § 114(r)(1)(C) specifically prohibited MacLean's.

That it is not a prohibition in no way renders § 114(r) unimportant. The statute still fulfills the purposes for which Congress enacted it, such as enabling TSA to place information outside the reach of FOIA (that is, "section 552 of title 5") and to punish any employee disclosure not covered by the WPA. *See supra* at 31. But it does show that § 114(r) was not intended to establish an exception to the WPA's protections.

2. Even if § 114(r) could somehow be construed to constitute a prohibition, it would still lack the specificity demanded by the text of the WPA. At most, § 114(r) "provides only general criteria for withholding information." Pet. App. 14a. There are no guideposts to define what is "detrimental to the security of transportation," § 114(r)(1)(C), and the sweep of that phrase is potentially vast. Maintaining "the security of the nation's transportation system" is TSA's entire mission. *See* Pet. Br. 2 (internal quotation marks omitted). So telling the agency to forbid disclosures "detrimental to the security of transportation" comes perilously close to telling it to block any disclosure with which it disagrees.[12] There is no reason Congress cannot provide such broad grants of authority to agencies, but there is good reason to believe Congress would not want any such grants to constitute exceptions to the WPA.

When Congress wants to specifically prohibit DHS employees from disclosing certain information, it knows how to do so. Congress enacted 6 U.S.C. § 133 as part

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[12] Perhaps sensitive to the breadth of § 114(r), Congress did tell TSA not to use that provision "to conceal a violation of law, inefficiency, or administrative error" or to "prevent embarrassment." § 114(r)(4). But forbidding an agency to use a broad grant of authority in a few plainly improper ways only tells the agency how it may *not* regulate; it does not specifically prohibit any disclosure.

of the Homeland Security Act of 2002—the same law that gave TSA authority under § 114(r). Section 133(a) specifies that "critical infrastructure information" voluntarily submitted to the government cannot be disclosed except under narrowly delineated circumstances, "[n]otwithstanding any other provision of law." The meaning of "critical infrastructure information" is not left to an agency, but specifically defined by statute. *See* 6 U.S.C. § 131(3). And the law does not rely on an agency to enact the necessary prohibition; § 133 itself creates serious criminal penalties for employees who violate its restrictions. *See* § 133(f).

Congress has recognized that this provision satisfies the WPA. As part of the Whistleblower Protection Enhancement Act of 2012, Congress amended § 133. *See* Pub. L. No. 112-199 § 111, 126 Stat. 341 (2012). Section 133(c) now makes clear that critical infrastructure information that was not voluntarily submitted to the government, but was "independently obtained," can be disclosed under "section 2302(b)(8) of title 5"—that is, the WPA provision at issue in this case. As the Senate report confirms, this revision served to clarify that although voluntarily submitted critical infrastructure information may not be disclosed by whistleblowers, the same kind of information can be disclosed under the WPA if the information was obtained by other means. *See* S. Rep. No. 112-155, at 44-45. Section 114(r) not only looks nothing like § 133(a), it has never received similar treatment—presumably because Congress would never have imagined that it could be mistaken for a specific prohibition.[13]

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[13] Section 133 is by no means the only specific prohibition against disclosure applicable to TSA employees. *See also, e.g.*, 49 U.S.C. § 46311(a) (providing that a long list of government officials

Section 114(r)'s "insufficient specificity becomes even more apparent when it is contrasted with statutes that have been determined to fall under the WPA's 'specifically prohibited by law' proviso." Pet. App. 14a. The Court of Appeals examined two cases to demonstrate that point. In one, the MSPB concluded that the WPA "does not protect the disclosure of confidential information to unauthorized persons where such disclosure is specifically prohibited by the Trade Secrets Act." *Kent*, 56 M.S.P.R. at 540-46.[14] That statute's specificity is clear on its face: The Act defines the information that cannot be disclosed directly, not by delegating to an agency. And it defines the information using a detailed and comprehensive list—prohibiting, for example, disclosure of a company's "profits" and "expenditures." That is far more specific than § 114(r)(1)(C), which identifies information only by the prospective

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and employees "shall be fined under title 18, imprisoned for not more than 2 years, or both, if the [official] or employee knowingly and willfully discloses information that * * * the [official] or employee acquires when inspecting the records of an air carrier").

[14] The Trade Secrets Act, 18 U.S.C. § 1905, provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, * * * publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties * * * which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association * * * shall be fined no more than $1000, or imprisoned not more than one year or both; and shall be removed from office or employment.

effect its disclosure would have, forcing a would-be whistleblower to speculate as to whether revealing it would be "detrimental to transportation security."

In the second case, the Ninth Circuit found the WPA satisfied by § 6103 of the Internal Revenue Code. *See Coons* v. *Sec'y of Treasury*, 383 F.3d 879, 890–91 (9th Cir. 2004).[15] Here again, the statute bears the hall-

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[15] 26 U.S.C. § 6103(a) provides that "no officer or employee of the United States * * * shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section." Section 6103(b) defines "return" and "return information":

> (1) Return.--The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.
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> (2) Return information.--The term "return information" means--
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> (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense,
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> (B) any part of any written determination or any background file document relating to such written determina-

marks of specificity: It identifies certain types of information, which the statute defines in detail directly by the qualities of the information, not by the predicted effect its disclosure would have. A potential whistleblower need only refer to the statutory definition to know in advance whether she will qualify for whistleblower protections.

Because the WPA requires *specific* prohibitions to defeat its protections, general statutes like § 114(r) cannot also defeat those protections. *See Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 257-58 (1993) (refusing to adopt a broad definition of "equitable relief" where interpretation "would limit the relief *not at all.*"). Of course, the WPA does not set a particularly high bar for Congress when it wishes to render the WPA inapplicable. As the above examples demonstrate, Con-

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tion (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,

(C) any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to such agreement or any application for an advance pricing agreement, and

(D) any agreement under section 7121, and any similar agreement, and any background information related to such an agreement or request for such an agreement, but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

gress knows how to legislate specific prohibitions when it wants to. Nor did Congress disable itself from delegating the task of promulgating specific prohibitions to agencies. The WPA is Congress's creation, and Congress can override it whenever it wants. As previously noted, nothing prevents Congress from allowing an agency to prohibit disclosures "notwithstanding the Whistleblower Protection Act," and § 114(r) already contains identical language overriding FOIA. *Supra* at 31. That Congress chose not to include similar language with respect to the WPA is simply further evidence that Congress did not intend § 114(r) to defeat whistleblower protections.

3. DHS's primary response hinges on *FAA* v. *Robertson*, 422 U.S. 255 (1975). In that case, the Court considered whether a statute allowing the FAA to restrict public access to information satisfied an exception to FOIA for information "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3) (1970). Because that language resembles § 2302(b)(8)(A), DHS argues that the WPA's exceptions must be just as broad as *Robertson*'s reading of the FOIA exemption, "[a]s a textual matter." Pet. Br. 29.

The problem with that theory is that the *Robertson* Court did not analyze the statutory text, beyond finding it "unclear and ambiguous, compelling resort to the legislative history." 422 U.S. at 263. Having considered that history, the Court explained that Congress had manifested an exceedingly clear intent not to disturb a host of earlier statutes allowing agencies to withhold information from the public, notwithstanding the disclosure provisions of the Administrative Procedure Act. *Id.* at 263-65. The Court then noted that FOIA could be read to trump the particular withholding statute at issue "only if [FOIA] is to be read as re-

pealing by implication all existing statutes which restrict public access to specific Government records." *Id.* at 265 (internal quotation marks omitted). Emphasizing the principle that "repeals by implication are disfavored," the Court held that FOIA did not compromise agencies' ability to withhold information under the pre-FOIA statutes. *Id.* at 265-66 (internal quotation marks omitted).

That reasoning offers no support for DHS's interpretation of the WPA. DHS cites nothing in the legislative history of the WPA suggesting that Congress believed general withholding statutes like § 114(r) would defeat whistleblower protections. And the canon against implied repeals has no relevance here. In *Robertson*, finding that FOIA covered the pre-existing withholding statutes would have effectively repealed them, because FOIA allows any member of the public to obtain information, so anyone can access information not subject to a FOIA exemption. But the WPA allows disclosures only by government employees who already have the information in question, and only under a few specific circumstances. That means that § 114(r) performs largely the same functions—allowing the agency to defeat FOIA requests and prohibit the vast majority of possible employee disclosures—even if it is not an exception to the WPA.

Indeed, to the extent *Robertson* has any weight here, it hurts DHS's case. "As a textual matter," Pet. Br. 29, it could stand only for the proposition that the WPA is "unclear and ambiguous, compelling resort to the legislative history." 422 U.S. at 263. And as discussed previously, the WPA's legislative history runs directly counter to DHS's interpretation. *See supra* at 24-27.

DHS gains even less by comparing Congress's post-*Robertson* amendment of FOIA to its enactment of § 2302(b)(8)(A). To begin with, the purpose of that amendment was to *overrule* the decision in *Robertson*, precisely because it allowed an agency to withhold information based on too general a statute. *See Consumer Prod. Safety Comm.* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 121 n.18 (1980). But even assuming that Congress believed courts would use *Robertson* as a guide to interpreting § 2302(b)(8)(A) despite Congress having overturned that decision, that odd assumption would not—contrary to DHS's assertion—have suggested that courts would read § 2302(b)(8)(A) in the same manner as *Robertson* read pre-amendment FOIA. As just discussed, *Robertson* disavowed any reliance on text, instead using legislative history. Congress could thus have had no reason to think that courts relying on *Robertson*'s interpretation of FOIA would reach the same result in interpreting the WPA, given the two statutes' very different legislative history. Indeed, the Senate report accompanying § 2302(b)(8)(A) explains that the provision should be interpreted not as *Robertson* read FOIA, but rather using the very same words that Congress used when overturning *Robertson*. *Compare* S. Rep. No. 95-969 at 21 (whistleblowers' disclosures protected except when prohibited "by a statute which requires that matters be withheld from the public in such a manner as to leave no discretion on the issue, or by a statute which establishes particular criteria for withholding or refers to particular matters to be withheld") *with* 5 U.S.C. § 552(b)(3) (1976) (exempting information from FOIA if a "statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria

for withholding or refers to particular types of matters to be withheld").[16]

The committee that drafted the Senate's initial version of § 2302(b)(8)(A) did suggest that one existing statute would satisfy an earlier version of that provision. Section 102(d)(3) of the National Security Act of 1947 provides that "the director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." Pub. L. No. 80-253, 61 Stat. 498 (1947). DHS asserts that § 114(r) "compares favorably" to that language. Pet. Br. 33.

Section 102(d)(3) is, however, a more specific law than § 114(r), because the former statute identifies categories of information—intelligence sources and the methods of collecting intelligence—that are protected, rather than requiring a would-be whistleblower to work backwards from the potential results of a release to determine whether it would be "detrimental to the security of transportation." *See CIA* v. *Sims*, 471 U.S. 159, 167 (1985) ("Section 102(d)(3), * * * which calls for the Director of Central Intelli-

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[16] DHS contends that Congress did not intend the Senate's interpretation because it adopted the House's language—"specifically prohibited by law"—rather than the Senate's "specifically prohibited by statute." That contention simply ignores the Conference Report's explanation of this drafting choice. *See supra* at 24. But it also makes no sense here: Whether § 114(r) specifically prohibited MacLean's disclosure does not turn on whether § 114(r) is a law or a statute; it is unquestionably both. The issue is whether § 114(r) constitutes a specific prohibition. Because the wording of the House and Senate bills is identical on that score ("specifically prohibited"), DHS cannot plausibly describe the House version as "more broadly worded," Pet. Br. 32, on this question.

gence to protect intelligence sources and methods, clearly refers to particular types of matters * * * ." (internal quotation marks omitted)). And rather than telling the agency to enact new regulatory prohibitions, § 102(d)(3) assigns responsibility for preventing disclosures that are already "unauthorized." That makes sense, because disclosing sources and methods was already prohibited by other authorities that would satisfy the WPA. *See, e.g.*, Exec. Order No. 11905, 41 Fed. Reg. 7703 (Feb. 18, 1976); Exec. Order No. 11652, 37 Fed. Reg. 5209 (Mar. 8, 1972).

In fact, § 102(d)(3) forms part of a series of interlocking measures making abundantly clear that whistleblower protections do not apply to intelligence matters. For instance, the WPA expressly denies its protections to employees of the CIA, FBI, NSA, and several other intelligence-focused agencies. *See* 5 U.S.C. § 2302(a)(2)(C). It is therefore unsurprising that a Senate committee assumed the WPA would not disturb § 102(d)(3) or other pre-existing measures protecting sources and methods from disclosure. *Cf. Robertson*, 422 U.S. at 263-65 (relying on Congress's intent to grandfather in withholding statutes that predate FOIA).[17] By contrast, when Congress created DHS, it went out of its way to spec-

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[17] DHS also gains nothing by noting that § 102(d)(3) qualifies as a FOIA exemption. *See* Pet. Br. 34 (citing *Sims*, 471 U.S. at 167-168). That § 102(d)(3) trumps both FOIA and the WPA does not imply that § 114(r) must also do so, given that the text of § 114(r) expressly renders FOIA inapplicable, but says nothing at all about the WPA.

ify that the new agency was *not* exempt from whistleblower protections. *See* Homeland Security Act § 883 ("Nothing in this Act shall be construed as exempting the Department from requirements * * * to provide whistleblower protections for employees of the Department (including pursuant to the provisions in section 2302(b)(8) * * * ."). In short, Congress's careful and express exemption of intelligence matters from the WPA only further proves that Congress did not intend, sub silentio, to make § 114(r) an exemption for DHS.

II. DHS'S POLICY ARGUMENTS CONTRADICT THE STATUTE'S CLEAR TEXT AND PURPOSE.

The balance Congress struck in the WPA is not only clear, it is also entirely reasonable: By allowing an express statutory prohibition or an Executive order to place disclosures off-limits to whistleblowers, Congress ensured that the government could protect information that ought never to be disclosed. For the remaining information, Congress chose to make the default rule simple: whistleblower protections are available so long as the disclosures comply with the WPA's requirements. *See* 5 U.S.C. § 2302(b)(8). That does not deprive agencies like DHS of the ability to protect their legitimate secrets. It simply means that agencies must persuade at least one elected official of their need to keep something secret.

DHS disagrees with this allocation of responsibility, urging that it can decide on its own what information should be hidden from public view with less oversight from the public's representatives. *See* Pet. Br. 34-41. That is hardly surprising; oversight is

seldom something enjoyed by the overseen. But it begs the question for DHS to insist that the Court of Appeals' decision disregards the balance Congress struck. The Court of Appeals simply applied the text Congress enacted. If the court interpreted that text correctly—and, for all the reasons given above, it did—then it is DHS's effort to punish MacLean that "undermines the careful line that Congress drew." Pet. Br. 34.

Nor is the agency correct that Congress "could not have intended" the WPA to protect disclosures of what DHS deems "Sensitive Security Information." *Id.* at 37. To begin with, it is important to remember what "SSI" is not: classified information. The WPA provides no protection at all for those who disclose anything "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." § 2302(b)(8)(A). Anyone who discloses that information can not only be fired without giving the WPA a second thought, but convicted of a felony and thrown in prison. *See, e.g.*, 18 U.S.C. § 798.

SSI, by contrast, is what one bipartisan congressional report recently called "pseudo-classification." Committee on Oversight and Government Reform, *Pseudo-Classification of Executive Branch Documents: Problems with the Transportation Security Administration's Use of the Sensitive Security Information (SSI) Designation* (May 29, 2014) at 3 [hereinafter "*SSI Report*"]. As DHS notes, "each of the TSA's more than 60,000 employees" has access to SSI, Pet. Br. 37—meaning everyone from air marshals to the "screeners" who tell airline passengers to take off their shoes and put their laptops in a separate bin. SSI is also shared with private airline and

airport employees, who need not even have undergone a basic background check. *See* 49 C.F.R. § 1520.11(c). It is scarcely surprising that such loosely-kept secrets seldom remain secret. Various air marshals, for example, have revealed SSI for reasons such as to ensure that a spouse knew when to pick him up and "to coordinate meetings with * * * flight attendants in his hotel room, for personal reasons." Pet. App. 73a, 107a. These marshals, however, kept their jobs.[18]

That gets to the heart of why Congress excluded agency-made regimes like SSI from the specific prohibitions exempted by the WPA. Their vague nature and flexible enforcement render them "vulnerable to misuse." *SSI Report* at 3. For example, of the 16 categories of SSI enumerated by regulation, number 16 is simply "Other information." 49 C.F.R. § 1520.5(b)(16). And the agency need not even identify specific information as SSI in advance. Classified information is defined in part by being marked as such, so employees will know in advance whether information is classified, and agencies cannot punish whistleblowers by retroactively designating infor-

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[18] In the Court of Appeals, DHS distinguished these cases because MacLean had not "showed remorse" for his disclosure. Pet. App. 8a. That, however, is inherent in the nature of a whistleblower: The employee revealing agency abuses believes she is doing the right thing, so there is no reason she would feel remorse. That is especially true where, as here, the agency admits its mistake and individuals such as United States Senators praise the whistleblower's courage. *See supra* at 12. DHS may prefer that whistleblowers confess their sins and repent from ever again subjecting the agency's errors to public scrutiny, but that only highlights the disparity between the goals of DHS and the goals of the WPA.

mation as classified after a disclosure occurs.[19] TSA, however, maintains that certain information is "born" SSI, meaning that it is inherently SSI even if not labeled as such. *See* Mitchel A. Sollenberger, Cong. Res. Serv., RL32425, *Sensitive Security Information and Transportation Security: Issues and Congressional Options* (2004). TSA can thus wait until *after* a whistleblower discloses information, then, ex post facto-like, declare that the information had been SSI all along. *See MacLean* v. *DHS*, 543 F.3d 1145, 1149, 1152 (9th Cir. 2008).

The sweeping flexibility TSA has given itself is not merely theoretical. When TSA issued its 2006 order retroactively declaring the 2003 text message MacLean disclosed to be SSI, its director of SSI was Andrew Colsky. Mr. Colsky signed that order and was deposed in this case. Pet. App. 141a; Brief for Petitioner at 25-26, *MacLean* v. *DHS*, 543 F.3d 1145 (2008) (No. 06-75112), 2007 WL 903924. Mr. Colsky has since stated, "I am unable to assist [TSA's counsel] with any testimony in future cases as I don't

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[19] *See* 50 U.S.C. § 3126(1) ("The term 'classified information' means information or material designated and clearly marked or clearly represented * * * as requiring a specific degree of protection against unauthorized disclosure for reasons of national security."); Exec. Order No. 13526 § 6.1(i), 75 Fed. Reg. 707, 727 (Dec. 29, 2009) (" '[C]lassified information' means information that * * * is marked to indicate its classified status when in documentary form."). This means that would-be whistleblowers should not have to guess whether information cannot be disclosed because it could be "classifiable," even if not actually classified. H. R. Rep. No. 100-991 at 10 & n.36. (1988).

know what to honestly call SSI anymore. I also cannot sign my name to court documents confirming SSI decisions because I may find the very same information on the news the same day." *SSI Report* at 18. And in an apparent reference to this case, he even admitted, "I am very uncomfortable in that I have personally given a deposition under oath in a very similar case supporting the fact that this is SSI and a man lost his job over it." *Id.*[20]

In short, the current SSI regime is exactly the sort of ill-defined, discretion-based system that Congress feared when enacting the WPA. *See supra* at 24-27. That is not to say that much of the information labeled as SSI does not warrant protection. But to a great extent, it already is protected: Section 114(r) achieves not only its primary purpose of enabling TSA to block FOIA requests for SSI, it allows the agency to prohibit any disclosure of SSI except where the WPA's narrow strictures are met. That means an employee can reveal SSI only in rare, dire, and carefully enumerated circumstances, such as when an agency is breaking the law or creating "a substan-

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[20] This flexible use of the SSI designation is neither new nor unique to this case. From its inception, the SSI regime prompted concerns that it was used to avoid embarrassment and to "muzzle debate of security measures." Mitchel A. Sollenberger, Cong. Res. Serv., RS21727, *Sensitive Security Info. (SSI) & Transp. Security: Background & Controversies* 6 (2004), *available at* http://fas.org/sgp/crs/RS21727.pdf. And a bipartisan committee of Congress has catalogued several questionable uses of SSI unrelated to this case, such as TSA using the SSI label to hide an embarrassing incident involving the search of a congressman, yet releasing other information designated as SSI in order to reap public relations benefits. *See SSI Report* at 12-19.

tial and specific danger to health and public safety." § 2302(b)(8)(A). Nor is DHS unable to fire employees who reveal SSI unnecessarily, then hide behind irrational or disingenuous claims of whistleblowing. The WPA affords protection only if the employee "reasonably believe[s]" the enumerated abuses are present, *id.*, meaning that courts apply an objective standard to determine whether the WPA covers the employee's actions. *See Lachance* v. *White*, 174 F.3d 1378, 1380 (Fed. Cir. 1999).

Where those statutory safeguards do not suffice, the remedy has already been mentioned: DHS can persuade Congress or the President to approve a more specific prohibition that overrides the WPA. Indeed, DHS maintains that a significant amount of SSI qualifies for classification under existing authorities. Pet. Br. 3.[21] Placing truly vital secrets behind such specific barriers would satisfy both the text of the WPA and its purpose, ensuring agency accountability by requiring elected officials' blessing in place

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[21] DHS states that TSA chooses not to classify this information so that it can be quickly shared with airline and airport employees who may lack security clearances. Pet. Br. 6. But there is no constitutional or statutory impediment preventing the Executive from authorizing the release of classified information where it deems necessary. In fact, similar authorizations already exist. *See, e.g.*, Exec. Order 13526 § 4.2(b) (authorizing agency heads to designate personnel who may disclose classified information "to an individual or individuals who are otherwise not eligible for access" in emergency situations); 6 C.F.R. § 7.23(a) ("The DHS Undersecretary for Management has delegated to certain DHS employees [authority] * * * to disclose classified information to an individual or individuals not otherwise eligible for access in emergency situations * * * .").

of possible employee reporting. It would also clearly tell would-be whistleblowers which information cannot be disclosed while creating the predictability needed to encourage them to come forward with the sort of information Congress wants brought to light.

For information that remains outside those specific prohibitions, DHS is correct: Whether that information becomes public may sometimes depend on the judgment of an individual employee. Congress, however, clearly contemplated that result. Some degree of trust in individual employees is inherent in the concept of a whistleblower, who by definition is someone who disregards an agency's decision not to reveal information. That trust in individual judgment inevitably accepts the possibility that some employees will make mistakes, even if, as DHS points out, *see* Pet. Br. 38-39, those mistakes could have serious costs. But government agencies have no claim to perfect judgment either, and their mistakes can have consequences just as severe. Indeed, although DHS posits *theoretical* harms that could ensue from employees revealing information that the Executive and Legislative branches have chosen not to classify, the costs of *actual* agency scandals—from the recent Veterans Administration debacle to the TSA misdeeds chronicled by the *SSI Report*—have been considerable. It is thus far from unthinkable that Congress would accept whatever risks result from denying DHS's pseudo-classification system the power to deter and punish whistleblowers. And again, if DHS believes some information—including air marshal deployments—truly should never be revealed, it need only justify that conclusion to the Executive or Congress.

Nor is it any answer to suggest that whistleblowers should be limited to contacting the Inspector General's Office or the Office of Special Counsel. *See* Pet. Br. 35. Congress passed the Inspector General Act of 1978 shortly *before* it promulgated the first laws protecting whistleblowers, which also created the Office of Special Counsel. *See supra* at 4; Pub. L. No. 95-452, 92 Stat. 1101 (1978). Yet Congress nonetheless enacted—and reenacted—laws protecting *public* disclosures. This case helps illustrate why. Going to the Inspector General first—as MacLean did—is surely preferable, but sometimes even the Inspector General fails, as it did when it told MacLean to think about his career and "just walk way." JA97-98. And the Office of Special Counsel could only have ordered DHS to investigate its own policy *after* a 15-day review period. *See* 5 U.S.C. § 1213(b). Where, as here, a government employee seeks to warn of a dangerous policy before it has catastrophic effects, such internal reporting options may be inadequate. For those circumstances, Congress chose to establish and protect a final safety valve of individual, public reporting.

If that choice is unwise, Congress can revisit it. But this case does not suggest that Congress should. Here, it was the *agency* that was forced to acknowledge that its policy was "a mistake" once MacLean went forward. JA72. Pulling air marshals from the flights most threatened by a looming terrorist plot in order to save money on hotels is not, it turns out, a policy that either the Executive or Congress supports. *See id.* at 59-72.[22] Precisely to pre-

[22] DHS suggests that the Court of Appeals agreed with its litigation position that MacLean's disclosure " 'compromised flight

serve government employees' freedom to warn of such potentially disastrous bureaucratic errors, both the text and the purpose of the WPA protect MacLean from DHS's effort to punish his good deed.

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safety.' " Pet. Br. 39 (quoting Pet. App. 8a). Not exactly. The court merely summarized DHS's claims, stating: "The government *contends* that * * * Mr. MacLean's disclosure compromised flight safety * * * ." Pet. App. 8a (emphasis added). The same is true of DHS's other selective quotations on this issue. *Compare* Pet. Br. 39 (quoting Pet. App. 8a) *with* Pet. App. 8a. At best, the court merely "agree[d] with the government" that DHS's arguments supported—under a very deferential standard of review—the MSPB's decision to uphold firing MacLean rather than imposing a lesser penalty, assuming any action against him was not prohibited by the WPA. *See* Pet. App. 8a ("The Board analyzed the relevant * * * factors and did not abuse its discretion in concluding that Mr. MacLean's removal was not a disparate penalty.").

CONCLUSION

For the foregoing reasons, the Court of Appeals' judgment should be affirmed.

Respectfully submitted,

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September 2014

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
OCT 22 2014
OFFICE OF THE CLERK

No. 13-894

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, PETITIONER

v.

ROBERT J. MACLEAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In the course of protecting the Nation's transportation network, the Transportation Security Administration (TSA) "obtain[s] or develop[s]" a great deal of information, the disclosure of which would "be detrimental to the security of transportation," 49 U.S.C. 114(r)(1), and which cannot practicably be classified. Such "sensitive security information" (SSI) includes information about the deployment of federal air marshals, the procedures for screening passengers and baggage, potential transportation-related vulnerabilities, and a host of other security-related matters. See 49 C.F.R. Pts. 15, 1520. Recognizing the disastrous consequences that could result if such information were publicized and exploited, Congress has mandated that the TSA promulgate regulations prohibiting its disclosure. 49 U.S.C. 114(r)(1).

Under respondent's construction of 5 U.S.C. 2302(b)(8)(A) and 49 U.S.C. 114(r)(1), however, when Congress ordered the Under Secretary at the head of the TSA to prevent the disclosure of SSI, Congress at the same time left with each of TSA's 60,000 employees the authority to unilaterally expose that very same information about the actual and perceived vulnerabilities in our national security system. Respondent's brief fails entirely to confront the considerable dangers his position invites.

As respondent interprets Section 2302(b)(8)(A), an employee would potentially enjoy immunity for disclosing SSI whenever his personal opinion on a debatable security issue differs from the judgment reached by the expert agency officials entrusted by Congress to decide that issue. The employee may have no knowledge of the full range of threats that the agency must address; no knowledge of the other measures the agency has taken to address the deficiency the employee perceives; no knowledge of the costs of alternative measures or the resource constraints that Congress may have imposed; and no knowledge of how our adversaries might use the information they gain from the disclosure to harm the safety and security of the United States. And even an employee with full knowledge may simply reach a different judgment from that reached by the expert agency.

Having made his own individual risk assessment and cost-benefit analysis, the employee could effectively derail any TSA plan he disfavors by disseminating the plan around the world on the Internet or through traditional media. And the TSA would be left to clean up the mess, scrambling to develop and im-

plement a new plan—likely one previously considered and rejected as suboptimal—while hoping that now-exposed vulnerabilities remain unexploited in the interim.

The Congress that ordered the Under Secretary to prevent disclosure of SSI could not have intended the TSA's expert decisions on disclosure and a wide range of critical security matters to be subject to veto by any individual federal employee, regardless of how incompletely informed (though perhaps well-intentioned) that employee may be. Even less could it have intended that such a veto come in the form of a publicly disclosed roadmap of how to circumvent existing security measures.

Section 2302(b)(8)(A) does not create such a massive loophole in the TSA's ability to protect security by keeping SSI confidential. The text makes clear that Section 2302(b)(8)(A)'s protections do not apply to disclosures that are "specifically prohibited by law." 5 U.S.C. 2302(b)(8)(A). That proviso comfortably encompasses the congressionally mandated scheme under which the disclosure of SSI is prohibited. And although respondent seeks to bolster his statutory argument by invoking the specter of an agency using its regulatory authority "to choke off the very safety valve that [Section 2302(b)(8)(A)] seek[s] to keep open" (Br. 2), that concern has no force when, as here, Congress *itself* orders an agency to promulgate regulations barring disclosure of specific information.

A. Disclosure Of SSI Is "Specifically Prohibited By Law" Under The TSA's Regulations

Respondent does not dispute that the natural definition of the phrase "by law" includes regulations like the TSA's legislatively mandated SSI regulations.

See, *e.g.*, Br. 27. He also does not dispute that he bears the burden to provide a "clear showing" of "legislative intent" that the term "by law," which would presumptively include regulations with the force and effect of law, in fact excludes such regulations. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295-296 (1979); see Resp. Br. 27. He has not carried that burden.

1. Although respondent acknowledges that the phrase "by law" would presumptively include the SSI regulations, he asserts (Br. 19-20, 30-31) that the phrase cannot have that meaning in Section 2302(b)(8)(A), because other portions of Section 2302(b) refer to "law, rule, or regulation." That argument fails. As the government's opening brief explains (at 22-24), the juxtaposition of the two phrases indicates at most that the phrase "by law" excludes *some* regulations, but does not suggest that it excludes *all* regulations or that it excludes the particular congressionally mandated regulations at issue here.

Respondent's contention that the terms "law" and "regulation" must be entirely distinct is unsound. The words describe inherently overlapping categories. See *Chrysler Corp.*, 441 U.S. at 295-296. Some things are both "regulations" and "law" (*e.g.*, regulations with the force and effect of law); some are "law" but not "regulations" (*e.g.*, statutes); and some are "regulations" but not "law" (*e.g.*, internal procedural regulations without legally binding force). When categories overlap, a reference to one without the other does not naturally exclude the area of overlap. A reference to "movies and documentaries," for example, would not imply that a later reference to "movies" excludes documentaries that are movies, as opposed to merely excluding documentaries that are not movies (such as

documentary television programs). By the same token, a reference to "law * * * or regulation" would not imply that a later reference to "law" excludes all regulations, as opposed to merely excluding regulations lacking the force of law (such as internal procedural regulations). Indeed, another subsection of 5 U.S.C. 2302, added in 1998, explicitly categorizes certain "regulation[s]" as "provision[s] of law." 5 U.S.C. 2302(e)(1)(H); see Veterans Employment Opportunities Act of 1998, Pub L. No. 105-339, § 6(b), 112 Stat. 3187-3188.

This Court recognized as much in *Department of the Treasury* v. *Federal Labor Relations Authority*, 494 U.S. 922 (1990). The Court there noted that "'laws'" could not "mean the same thing" as "'any law, rule, or regulation'" in a statute in which both appeared. *Id.* at 931-932. It observed, however, that the term "'laws'" could "extend[] to *some*, but not all, rules and regulations." *Id.* at 932-933 (emphasis added). Respondent dismisses the significance of the Court's observation, noting that the full phrase at issue in that case was not just "laws" but "applicable laws." Br. 30. Respondent offers no explanation, however, for why the presence of a limiting qualifier ("applicable") would give the term "laws" a broader meaning than it would have in isolation. And this case involves not the limited phrase "applicable laws," or even the phrase "by any law," but the common and expansive phrase "by law," which most naturally refers to a broad body of legal authority, including regulations that Congress has required an agency to promulgate.

2. Respondent's reliance (Br. 20-22, 31-32) on the "[s]tructure" of Section 2302(b)(8) is unavailing. Re-

spondent points out (Br. 20-22) that Section 2302(b)(8)(A) explicitly declares its protections inapplicable both to disclosures "specifically prohibited by law" and to disclosures of information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." As the government's opening brief explains (at 25), Congress's clarification about Section 2302(b)(8)(A)'s applicability to information covered by certain Executive Orders does not give rise to any inference that the phrase "by law" excludes all regulations, including regulations like those at issue here.

The SSI regulations are not only authorized, but mandated, by Congress. 49 U.S.C. 114(r)(1). By contrast, the Executive Orders referenced in Section 2302(b)(8)(A), which govern classified information, flow from the President's own constitutional responsibility to protect national security and thus "exist[] quite apart from any explicit congressional grant" of authority. *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988). Construing the phrase "'authorized by law'" in a disclosure-related statute in *Chrysler Corp.* v. *Brown*, *supra*, this Court distinguished between authorization "rooted in a grant of * * * power by the Congress," which would qualify as authorization "by law," and authorization rooted in inherent executive authority, which would not. 441 U.S. 302; see *id.* at 302-308. Had Section 2302(b)(8)(A) included only the "specifically prohibited by law" proviso, and not expressly addressed orders issued pursuant to the President's inherent classification authority, the provision might have been construed as a congressional effort to supersede those orders. The additional language clarifying Congress's intent to avoid

such separation-of-powers concerns casts no doubt on the natural reading of the phrase "by law" to include legislatively mandated regulations.

3. Respondent fails to locate a "clear showing" in the legislative history of Section 2302(b)(8)(A) that the phrase "by law" excludes all regulations. See Gov't Br. 25-28. He contends that Congress necessarily intended the phrase "by law" to be narrower than the phrase "by law, rule or regulation" because Congress intentionally chose the former over the latter. Resp. Br. 24-25. But for reasons explained above, that choice does not show that the phrase "by law" excludes *all* regulations.

The interpretive principle on which respondent relies—that "Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," Br. 25 (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987))—supports the government's position, not respondent's. As respondent acknowledges (Br. 34), Congress considered, but did not enact, language that would have limited the Section 2302(b)(8)(A) proviso to disclosures "prohibited by statute." See Gov't Br. 25-26 (emphasis omitted).

Respondent primarily dismisses (Br. 35) the change as merely "stylistic." Focusing on language in the Conference Report stating that the phrase by law refers "to statutory law and court interpretations of those statutes," H.R. Conf. Rep. No. 1717, 95th Cong., 2d. Sess. 130 (1978) (Conference Report), respondent alternatively posits (Br. 35) that Congress made the change simply to clarify that judicial statutory-interpretation decisions would be covered. But it is implausible that any agency or court would have con-

strued the phrase "prohibited by statute" *not* to encompass the statutory interpretations of this Court or other courts.

Accordingly, the better explanation for the change from "statute" to "law" is that Congress's conception of "statutory law" went beyond the four corners of a statute and included, at the very least, regulations that a statute requires to be promulgated. Nothing in the legislative history shows that Congress had any concern about a proviso broad enough to encompass such regulations. It instead simply reflects concern that the proviso not allow unilateral "*agency* rules and regulations," Conference Report 130 (emphasis added), or "*internal procedural* regulations," S. Rep. No. 969, 95th Cong., 2d Sess. 21 (1978) (Senate Report) (emphasis added), through which agencies on their own might effectively nullify the protections that Section 2302(b)(8)(A) provides. See Gov't Br. 25-27.

The 1978 Congress's decision to use the word "law" in the proviso cannot be overridden by legislative materials drawn from *later* Congresses that use the word "statute" instead. See Resp. Br. 25-26. "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011). Nor can Congress be understood to have acquiesced to a rewriting of the statutory language by the Merit Systems Protection Board (MSPB) in *Kent* v. *GSA*, 56 M.S.P.R. 536, 542-543 (1993). See Resp. Br. 26-27. Respondent provides no evidence that Congress was actually aware of *Kent*; the regulation at issue in *Kent* was not promulgated pursuant to a statute that expressly contemplated nondisclosure rules (see 56 M.S.P.R. at 542; 40 U.S.C. 486(c) (1994));

and it is far from clear that Congress would have viewed *Kent* to apply in that situation, see Pet. App. 150a-152a (administrative judge's conclusion that *Kent* was not controlling here). In any event, any assumption that Congress invariably responds to MSPB decisions on this issue is belied by the legislative inaction following the MSPB's decisions in this case in 2009 (Pet. App. 128a-139a) and 2011 (*id.* at 30a-37a), both of which held that a disclosure of SSI is "specifically prohibited by law."

4. Respondent's arguments (Br. 22-24, 33-34) about the "[p]urpose" of Section 2302(b)(8)(A) are question-begging. Everyone agrees that Section 2302(b)(8)(A) was enacted to encourage employees to come forward with information about certain types of undesirable government activity. See, *e.g.*, Gov't Br. 35. Everyone also agrees that the final wording of the "specifically prohibited by law" proviso reflects some degree of concern that agencies would enact nondisclosure regulations that would preclude the sorts of public disclosures that Section 2302(b)(8)(A) encourages. *Id.* at 26-27. But because everyone further agrees that "no legislation pursues its purposes at all costs," Resp. Br. 23 (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam)), those general principles do not counsel in favor of respondent's cramped view of the term "by law" as excluding *all* regulations. Any congressional concern that agencies would abuse their rulemaking authority to prevent disclosure by whistleblowers is beside the point when Congress *itself* has ordered the agency to promulgate the nondisclosure regulations.

Respondent does not dispute that on his reading of Section 2302(b)(8)(A), even if a statute explicitly di-

rected the TSA to "promulgate a regulation barring the disclosure of air-marshal-deployment information," a disclosure in violation of such a regulation would not be prohibited "by law." Gov't Br. 24; see Resp. Br. 33. He asserts (*ibid.*) that this approach presents no "practical problem," because Congress could simply rewrite the nondisclosure statute. The question, however, is not whether Congress could, if necessary, repair the damage done by respondent's counterintuitive interpretation of the term "by law"; the question is whether that interpretation is correct. And respondent provides no reason why Congress would have intended (or thought) that a disclosure barred by a congressionally mandated regulation would be *permitted* "by law."

B. Disclosure Of SSI Is "Specifically Prohibited By Law" Under Section 114(r)(1)

Even if respondent had made a clear showing that the phrase "by law" excludes all regulations, his disclosure would nevertheless have been "specifically prohibited by law" under 49 U.S.C. 114(r)(1) itself. See Gov't Br. 28-34.

1. As the government's opening brief explains (at 28-33), the result in this case follows directly from this Court's decision in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975). *Robertson* addressed the scope of Exemption 3 of the Freedom of Information Act (FOIA), which allowed agencies, in responding to public requests for information, to withhold material "specifically exempted from disclosure by statute." *Id.* at 257 (quoting 5 U.S.C. 552(b)(3) (1970)). The Court held that the exemption applied where a statute merely gave a federal agency discretion to make a case-specific "judgment" about whether competing

interests favored disclosure. *Id.* at 258 n.4 (quoting 49 U.S.C. 1504 (1970)); see *id.* at 256-267. Respondent does not dispute that if Section 2302(b)(8)(A)'s "specifically prohibited by law" proviso were interpreted in the same way as the similarly-worded "specifically exempted from disclosure by statute" exemption in *Robertson*, the Section 2302(b)(8)(A) proviso would apply to Section 114(r)(1).

Respondent argues that *Robertson*'s construction of Exemption 3 should have no bearing on the interpretation of the Section 2302(b)(8)(A) proviso, because the Court in *Robertson* found the text of Exemption 3 to be "unclear and ambiguous" and relied on legislative history. Br. 42 (quoting *Robertson*, 422 U.S. at 263). That the phrase lacked a clear meaning *before* the Court decided *Robertson*, however, does not suggest that it lacked a clear meaning *afterwards*, when Section 2302(b)(8)(A) was enacted. This Court typically presumes that Congress is aware of this Court's construction of particular statutory language and intends to incorporate that construction when it enacts that language in another statute. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006). That presumption is particularly apt here, where Congress amended FOIA Exemption 3 itself in response to *Robertson*, but reverted to the pre-amendment formulation in enacting Section 2302(b)(8)(A). Gov't Br. 31-33. Had Congress intended the Section 2302(b)(8)(A) proviso to be construed more narrowly than Exemption 3 had been construed in *Robertson*, it is unlikely to have taken the head-in-the-sand approach of importing the *Robertson* formulation into Section 2302(b)(8)(A) and hoping the courts would interpret it differently.

2. Respondent contends that the "specifically prohibited by law" proviso cannot encompass Section 114(r)(1) because Section 114(r)(1) "does not prohibit anything; it 'only empowers the Agency to prescribe regulations prohibiting disclosure.'" Br. 36-37 (quoting Pet. App. 13a). That contention is irreconcilable not only with *Robertson*—which held that information could be "specifically exempted from disclosure by statute" even where the statute authorized an agency to make a discretionary judgment as a prerequisite to confidentiality, Gov't Br. 29-30—but also with the legislative history of Section 2302(b)(8)(A) and this Court's decision in *CIA* v. *Sims*, 471 U.S. 159 (1985).

As respondent acknowledges (Br. 45), the Senate Report accompanying a proposed version of the Section 2302(b)(8)(A) proviso—which would have been even *narrower* than the version eventually enacted—expressly anticipated that the proviso would cover Section 102(d)(3) of the National Security Act of 1947, ch. 343, 61 Stat. 498. Senate Report 21-22; see Gov't Br. 33-34. Section 102(d)(3) did not itself directly prohibit the disclosure of information, but instead provided that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." 50 U.S.C. 403(d)(3) (1976).

In *Sims*, this Court held that information designated as confidential pursuant to Section 102(d)(3) satisfied even the post-*Robertson* version of FOIA Exemption 3. 471 U.S. at 163-164, 167-168. The Court reached that conclusion based on the "plain meaning of the relevant statutory provisions," *id.* at 167 (internal quotation marks omitted), notwithstanding its recognition, later in its opinion, that Section 102(d)(3)

did not in itself "mandate the withholding of information that may reveal the identity of an intelligence source," but instead empowered the Director of Central Intelligence to make a determination about whether confidentiality was appropriate, *id.* at 180; see *id.* at 179-181. It is undisputed that the post-*Robertson* version of FOIA Exemption 3—which still included the requirement that information be "specifically exempted from disclosure by statute," *id.* at 167—is, at the very least, no broader than the Section 2302(b)(8)(A) proviso. See, *e.g.*, Resp. Br. 44-45.

Respondent attempts (Br. 46-47) to distinguish Section 102(d)(3) from Section 114(r)(1) on the grounds that at least some of the information covered by Section 102(d)(3) might also have been rendered nondisclosable by other legal authorities and that Section 2302(b)(8)(A) does not apply to various intelligence agencies. Those are distinctions without a difference. The Senate Report did not mention either point in discussing Section 102(d)(3). See Senate Report 21-22. Nor did *Sims*, in which Section 102(d)(3) was the only confidentiality statute at issue, turn on those points. 471 U.S. at 163-164.

3. Respondent contends (Br. 37-42) that even if Section 114(r)(1) constitutes a legal prohibition against disclosure, it is not sufficiently "specific[]" to fit within the Section 2302(b)(8)(A) proviso. He would limit the proviso to encompass only statutes that (1) contemplate little (or no) exercise of agency discretion in determining whether information should be confidential (see, *e.g.*, Br. 37) and (2) define the nondisclosable information "in detail directly by the qualities of the information, not by the predicted effect its disclosure would have" (Br. 41).

Respondent derives his conditions not from the text or history of Section 2302(b)(8)(A), but from cherrypicking three statutes that clearly satisfy the Section 2302(b)(8)(A) proviso, purporting to identify certain common features of those statutes, and then assuming that every statute satisfying the proviso must have those features. See Br. 37-42. That methodology—which could be employed to argue that apples are not "fruit," because the term "fruit" clearly covers grapefruits, passion fruits, and star fruits, all of which have "fruit" in their names—is unsound. Actions can be "specifically prohibited" without satisfying either of respondent's conditions. If a parent prohibits a child from eating any food that a doctor determines would cause health problems, the child would have no room to argue that the parent has not "specifically prohibited" the consumption of those foods.

When the Section 2302(b)(8)(A) proviso refers to a "disclosure * * * *specifically* prohibited by law" (emphasis added), the word "specifically" clarifies that the legal prohibition must actually be directed *at* disclosures. A proviso applicable to any "disclosure prohibited by law" might have been construed to encompass a prohibition on, say, using government property for unauthorized purposes, if the disclosure at issue had been made by e-mail from the employee's work computer. By using the word "specifically," Congress ensured that the proviso applies only when the law reflects a judgment about the propriety of the disclosure itself, as Section 114(r)(1) does.

In both *Robertson* and *Sims*, the Court applied Exemption 3's "specifically exempted from disclosure by statute" language in the context of statutes that did not contain either of respondent's proffered limita-

tions. In *Robertson*, the Court found a statute sufficiently "specific[]" even though "[t]he discretion vested by Congress in the [agency], in both its nature and scope, [was] broad," 422 U.S. at 266, and the statute conferring that discretion did not itself define exactly what information would be kept confidential, see *id.* at 258 n.4. Similarly, in *Sims*, the Court found Section 102(d)(3) sufficiently "specific[]" even though the Director of Central Intelligence had "discretionary authority," the exercise of which could not necessarily be predicted in advance, to "weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." 471 U.S. at 180-181.

4. No reasonable reading of the Section 2302(b)(8)(A) proviso could cover Section 102(d)(3) but not Section 114(r)(1). Respondent's attempt to portray Section 114(r)(1) as too narrow to "specifically prohibit" the disclosure of SSI is accordingly misconceived. Respondent notes (*e.g.*, Br. 31, 33) that Section 114(r)(1)'s preamble mentions FOIA but not Section 2302(b)(8)(A). See, *e.g.*, Former U.S. Gov't Officials Amicus Br. 23-25 (comparing Section 114(r)(1) with 6 U.S.C. 133(a)). No one disputes, however, that Section 114(r)(1)'s operative language applies to disclosures both inside and outside the context of a FOIA request, Gov't Br. 34 n.5, which is all that the Section 2302(b)(8)(A) proviso requires. Respondent additionally references (*e.g.*, Br. 46-47) a provision of the Homeland Security Act of 2002 stating that nothing in the Act should be construed to "exempt[]" the Department of Homeland Security from Section 2302(b)(8). Pub. L. No. 107-296, Tit. VIII, § 883, 116

Stat. 2247. This case, however, does not involve any request for an *exemption* from Section 2302(b)(8)(A), but instead involves the *application* of its explicit proviso specifying that it does not cover disclosures "specifically prohibited by law."[1]

C. Congress Did Not Intend SSI To Be Publicly Disclosed

1. As the government's opening brief explains (at 38-40), respondent's position would have serious, and possibly disastrous, practical consequences. It would potentially allow any TSA employee—even one ignorant of the actual considerations underlying the TSA's adoption of a particular security measure—to expose the perceived vulnerabilities of that measure to full public view.

Respondent's passing assertion (Br. 51) that Section 2302(b)(8)(A) immunizes employee disclosures only in "narrow," "rare," and "dire" circumstances is unsupported. When it applies, Section 2302(b)(8)(A) immunizes, *inter alia*, any disclosure "which the employee * * * reasonably believes evidences * * * a

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[1] Some of respondent's amici suggest that, in Executive Order No. 13,556, 3 C.F.R. 267 (2010 Comp. Pres. Doc.), the President affirmatively endorsed the application of Section 2302(b)(8)(A)'s protections to SSI. See, *e.g.*, Project on Gov't Oversight Amicus Br. 3-7. That suggestion misconstrues the Executive Order. The Order creates an overarching category of "Controlled Unclassified Information" (CUI), which encompasses a number of subcategories, including SSI. 3 C.F.R. 267. The Order states that "[t]he mere fact that information is designated *as CUI* shall not have a bearing on determinations pursuant to any law requiring the disclosure of information or permitting disclosure as a matter of discretion." *Ibid.* (emphasis added). The Order does not address whether, as a matter of statutory construction, Section 2302(b)(8)(A)'s "specifically prohibited by law" proviso applies to disclosures of SSI.

substantial and specific danger to public health or safety." Such a belief should be easy to allege in the context of SSI, where agencies must make difficult judgment calls (about, *inter alia*, which security threats should receive the most attention and how best to deal with those threats) that may be subject to reasonable disagreement. Gov't Br. 39-40. And because the reasonableness of the employee's belief turns on "the essential facts known to and readily ascertainable *by the employee*," 5 U.S.C. 2302(b) (emphasis added), an employee's disagreement with TSA policy can be "reasonabl[e]" even if caused in whole or in part by the employee's own ignorance of the full security picture.

If, for example, an employee reasonably disagrees, based on what he knows, with the relative risk assessments reflected in the "selection criteria * * * for screening of persons" at airports, 49 C.F.R. 1520.5(b)(9)(i), the MSPB or a court may well find the disclosure of the allegedly deficient screening criteria to be protected under Section 2302(b)(8)(A). Yet by disclosing the criteria, the employee will force the TSA to change them. Unless and until the TSA is able to develop and implement new criteria, the weaknesses exposed by the employee could be exploited by anyone passing through an airport checkpoint. And even then, the employee might choose to disclose the TSA's revised criteria, starting the process anew. Similar security concerns would arise from disclosures of other types of SSI, including but not limited to "security contingency plan[s]," 49 C.F.R. 1520.5(b)(1); "[s]ecurity measures or protocols recommended by the [f]ederal government," 49 C.F.R. 1520.5(b)(8)(i); and the "performance specification[s]" for magnetometers or

other equipment, 49 C.F.R. 1520.5(b)(4). Having required that the TSA's Under Secretary keep information confidential when he determines that its disclosure would "be detrimental to the security of transportation," 49 U.S.C. 114(r)(1)(C), Congress could not have expected or intended that individual TSA employees decide on their own to expose the national transportation network, and those who use it, to the grave risks of a disclosure.

Contrary to the contentions of some of respondent's amici (see, *e.g.*, U.S. Office of Special Counsel Amicus Br. 14-16), the serious security implications of respondent's position will not necessarily be cabined by Section 2302(b)(8)(A)'s requirement that an employee's reasonable belief relate to a "substantial and specific" public-safety danger. The Federal Circuit applies an amorphous multifactor test for determining whether a disclosure is based on a reasonable belief about a public-safety danger. *Chambers* v. *Department of Interior*, 602 F.3d 1370, 1376 (2010). Notably, "the fact that a particular health or safety [disclosure] involves a policy decision or disagreement does *not* deprive it of protection." *Ibid.* (emphasis added); see 5 U.S.C. 2302(a)(2)(D). And, unsurprisingly, application of Federal Circuit law can result in broad employee immunity in the context of transportation security. See, *e.g.*, *Aquino* v. *Department of Homeland Sec.*, 121 M.S.P.R. 35, 43-45 (2014) (concluding that a disclosure of "concerns about * * * moving the line control stanchions" at an airport screening checkpoint was covered by Section 2302(b)(8) largely because the fact that the government screens passengers in itself reflected the "seriousness" and "immi-

nence" of the dangers that the employee claimed to be trying to prevent).

Respondent asserts (Br. 54) that this case "illustrate[s]" the importance of public disclosures of SSI by employees. But whatever view one takes of the facts of this case—in which respondent intentionally disclosed information of a type that he knew could "endanger[] * * * flight[s]" and that the administrative judge found he knew to be SSI, Gov't Br. 7 (quoting Pet. App. 74a); see *id.* at 6-9—the rule respondent seeks is much more far-reaching. Consider just air-marshal-deployment information. See 49 C.F.R. 1520.5(b)(8)(ii). The TSA's ability to decide how best to deploy its limited number of marshals across tens of thousands of commercial passenger flights each day would be considerably hampered if every employee were entitled to second-guess the agency's final decision, reveal that decision to the public, and thereby force the TSA to shift its limited resources to flights initially deemed to be less at-risk.

2. Respondent's policy arguments are largely just attacks on the SSI system itself. See Br. 47-55. But Congress's policy views, not respondent's, control. Notwithstanding the President's authority to classify certain information, Congress has repeatedly given agencies protecting transportation security separate authority—which they are required to exercise—to safeguard information whose disclosure would harm transportation security. See Gov't Br. 2-6 (detailing the history of Section 114(r)(1)). Indeed, Section 114(r)(1) itself was enacted against a backdrop of preexisting SSI regulations substantially similar to the current ones. See *id.* at 22.

Even if the wisdom of the SSI regime were properly at issue, Congress had compelling reasons for creating it. Respondent's suggestion that the TSA could carry out its functions equally well if it simply categorized "truly vital secrets" as classified information (Br. 52) is seriously misguided. To begin with, a great deal of SSI must be shared with non-federal personnel who do not have security clearances. Such SSI includes, but is not limited to, airport security plans (49 C.F.R. 1520.5(b)(1)) and vulnerability assessments (49 C.F.R. 1520.5(b)(5)) that must be shared with local police and airport officials; security directives (49 C.F.R. 1520.5(b)(2)) that require the cooperation of airline employees (who can, for example, watch out for certain people trying to board flights); and the presence and identity of any federal air marshals on a particular flight (49 C.F.R. 1520.5(b)(8)(ii)), which for safety and security purposes is shared with flight attendants. Requiring security clearance for those tens or hundreds of thousands of non-federal airport and airline employees would strain federal resources and inhibit hiring in the transportation industry. Indeed, many of the persons with whom SSI must be shared are not United States citizens and thus cannot generally have access to classified information. See Exec. Order No. 12,968, § 2.6, 3 C.F.R. 396 (1995 Comp. Pres. Doc.), reprinted as amended in 50 U.S.C. 435 note (stringent standards for access to classified information by foreign nationals even when considered "employees"). These include employees of foreign airlines and airports, with whom, *inter alia*, the TSA coordinates countermeasures based on threat information originating overseas.

The problems would not stop there. Some SSI, such as the internal security plans developed by air carriers (49 C.F.R. 1520.5(b)(1)(i)), is not appropriate for classification because it originates outside of the federal government and is intended for private use. Exec. Order No. 13,526, § 1.1(2), 3 C.F.R. 298 (2009 Comp. Pres. Doc.) (permitting classification only of information "owned by, produced by or for, or * * * under the control of the United States Government"). Other SSI must be used in public places in order to be effective and thus cannot be stored in the manner that is required for classified information, see 32 C.F.R. 2001.43. Examples include inventories of explosives detectable by screening equipment and records of the performance of such equipment, which must be used and stored at security checkpoints; manuals with security procedures for airline crew members (49 C.F.R. 1520.5(b)(1)), which they are required to have with them at home, during flights, and at the hotels where they stay during travel; and calibration equipment for magnetometers and other screening equipment (49 C.F.R. 1520.5(b)(9)), which are used in operational environments.

3. Respondent's objections to how the TSA administers the SSI system (Br. 48-52) have no relevance to the question of statutory interpretation that this case presents. In any event, respondent is wrong to suggest (Br. 49-50) that the TSA can (or does) retroactively discipline employees for disclosing information not categorized as SSI at the time of the disclosure. Information described in 49 C.F.R. 1520.5(b)(1)-(15)—such as air-marshal-deployment information, see 49 C.F.R. 1520.5(b)(8)(ii)—is considered SSI from its inception. Although it is not always initially marked as

such, TSA employees are trained to understand the types of information that are SSI. See Gov't Br. 5-6. In rare circumstances—not including this case[2]—the determination that particular information is SSI may take place sometime after the information is created. See 49 C.F.R. 1520.5(b)(9)(iii) and (16). In such circumstances, the information becomes SSI only at that point, and the TSA would have no authority to discipline an employee for having disclosed the information earlier.

None of respondent's concerns about the administration of the SSI program counsel in favor of reading the Section 2302(b)(8)(A) proviso in the manner he urges. If an affected person believes that the TSA has exceeded its statutory authority in enacting the SSI regulations or has acted unlawfully in categorizing particular information as SSI, he can seek judicial review of the agency's actions. The Ninth Circuit here permitted respondent to bring an (unsuccessful) action under 49 U.S.C. 46110 contending that the infor-

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[2] Respondent was removed for disclosing information that was SSI from the moment it was created and that respondent knew to be SSI. The regulations in effect at the time of his disclosure categorized air-marshal-deployment information as SSI. 49 C.F.R. 1520.7(j) (2002). The administrative judge found not credible respondent's assertion that he was unaware the information he disclosed was SSI. Pet. App. 100a-103a. After the removal proceedings against petitioner had commenced, the TSA issued an order determining that, "under the regulations in place in 2003, 49 C.F.R. § 1520.7(j), the text message" disclosed by respondent "contained [SSI]." *MacLean* v. *Department of Homeland Sec.*, 543 F.3d 1145, 1149 (9th Cir. 2008) (per curiam). The Ninth Circuit correctly held that the order "d[id] not constitute a retroactive agency adjudication," but instead "applied regulations that were in force in 2003 to determine that information created in 2003 was [SSI]." *Id.* at 1152.

mation he disclosed should not, in fact, be considered SSI. See *MacLean* v. *Department of Homeland Sec.*, 543 F.3d 1145, 1149-1150 (2008) (per curiam). Similarly, if an employee believes he has unfairly been singled out for an adverse employment action for disclosing SSI, he may challenge the appropriateness of the disciplinary measure before the MSPB and the Federal Circuit. See, *e.g.*, 5 U.S.C. 7513(d). Respondent (unsuccessfully) raised such a challenge in this case. See Pet. App. 7a-9a. Finally, Congress itself has been attentive to concerns about overbroad designation of SSI. See Gov't Br. 41-42.

4. Application of the Section 2302(b)(8)(A) proviso to SSI does not deny appropriate recourse to employees who reasonably believe that such information shows government misfeasance or negligence. Nothing prevents an employee from publicly raising concerns about TSA actions *without* revealing SSI—say, by telling the media that federal air marshals will be absent from important flights, but declining to specify which flights. To the extent an employee believes a more specific disclosure is necessary, 5 U.S.C. 2302(b)(8)(B) provides that an employee is immunized from reprisal if he raises his concerns with intragovernmental oversight entities. See Gov't Br. 34-38. Those oversight entities can then consider the employee's concerns without exposing to public view information that has been deemed "detrimental to the security of transportation." 49 U.S.C. 114(r)(1)(C). Congress can also obtain access to SSI. See 49 U.S.C. 114(r)(2); see also 5 U.S.C. 2302(b).

Congress plainly viewed the combination of these intragovernmental channels as providing adequate means for addressing employees' concerns in circum-

stances where a public disclosure is "specifically prohibited by law." Respondent's individualized objections (Br. 54) to those procedures—based on his particular experience with an Inspector General employee and on his mistaken belief that the Special Counsel is required to wait 15 days before acting on a complaint, see 5 U.S.C. 1213(b) (requiring action "*within* 15 days") (emphasis added)—do not counsel in favor of reading the phrase "specifically prohibited by law" so narrowly as to allow the sorts of harmful disclosures that the congressionally mandated SSI scheme is specifically designed to prevent. See Gov't Br. 37.

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

OCTOBER 2014

APPENDIX

1. 5 U.S.C. 2302 provides:

Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

(2) For the purpose of this section—

(A) "personnel action" means—

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

(x) a decision to order psychiatric testing or examination;

(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and

(xii) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration;

(C) "agency" means an Executive agency and the Government Printing Office, but does not include—

(i) a Government corporation, except in the case of an alleged prohibited personnel practice

described under subsection (b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D);

(ii)(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and

(II) as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action; or

(iii) the Government Accountability Office; and

(D) "disclosure" means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences—

(i) any violation of any law, rule, or regulation; or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) any violation (other than a violation of this section) of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8);

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for[1] refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws

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[1] So in original. The word "for" probably should not appear.

of any State, of the District of Columbia, or of the United States;

(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement;

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title; or

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory pro-

visions are incorporated into this agreement and are controlling.".

This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. For purposes of paragraph (8), (i) any presumption relating to the performance of a duty by an employee whose conduct is the subject of a disclosure as defined under subsection (a)(2)(D) may be rebutted by substantial evidence, and (ii) a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title, including how to make a lawful disclosure of information that is specifically required

by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under—

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

(e)(1) For the purpose of this section, the term "veterans' preference requirement" means any of the following provisions of law:

(A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.

(B) Sections 943(c)(2) and 1784(c) of title 10.

(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

(D) Section 301(c) of the Foreign Service Act of 1980.

(E) Sections 106(f),[2] 7281(e), and 7802(5)[2] of title 38.

(F) Section 1005(a) of title 39.

(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans' preference requirement for the purposes of this subsection.

(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be

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[2] See References in Text note below.

available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to affect any authority under section 1215 (relating to disciplinary action).

(f)(1) A disclosure shall not be excluded from subsection (b)(8) because—

(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

(B) the disclosure revealed information that had been previously disclosed;

(C) of the employee's or applicant's motive for making the disclosure;

(D) the disclosure was not made in writing;

(E) the disclosure was made while the employee was off duty; or

(F) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(2) If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

SUPREME COURT, U.S.
FILED
SEP 29 2014
OFFICE OF THE CLERK

No. 13-894

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY,
Petitioner,
v.
ROBERT J. MACLEAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES IN SUPPORT OF ROBERT J. MACLEAN

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QUESTION PRESENTED

The Whistleblower Protection Act exists to encourage federal employees to disclose government wrongdoing to persons who may be in a position to remedy it and to protect employees who come forward from agency retaliation for making such disclosures.

The question presented is whether the Whistleblower Protection Act bars the Transportation Security Administration from retaliating against an employee who discloses information that reveals an agency mistake which causes a substantial and specific danger to public safety, when the employee's disclosure is retroactively deemed contrary to an agency regulation but is not specifically prohibited by law or Executive order.

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INTEREST OF THE AMICUS[1]

The American Federation of Government Employees ("AFGE") is a national labor organization that, on its own and in conjunction with affiliated councils and locals, represents over 650,000 civilian employees in agencies and departments across the federal government and in the District of Columbia. AFGE's representation of these employees includes collective bargaining and direct representation in unfair labor practice proceedings and grievance arbitrations arising under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* ("the Statute"). AFGE's representation of federal employees also extends to litigation before the United States Merit Systems Protection Board ("MSPB"), the United States Equal Employment Opportunity Commission, and before federal district and appellate courts across the United States. AFGE has a demonstrated history of representing whistleblowers and will continue to do so in the future. *See, e.g., Niswonger v. Dep't of the Air Force*, 60 M.S.P.R. 655 (1994).

Among the many employees for whom AFGE is certified as their exclusive labor organization are Transportation Security Officers, or "security screeners," employed by the Transportation Security Administration ("TSA"). *See U.S. Dep't of Homeland Security, TSA and AFGE and NTEU*, 65 F.L.R.A. 242 (2010). Unlike the majority of federal employees represented

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[1] The parties have filed blanket letters of consent to *amicus* briefs in support of either party or neither party. No counsel for a party authored this brief in whole or in part, and no person or entity other than AFGE or its counsel made a monetary contribution to the preparation or submission of this brief.

by AFGE, however, Transportation Security Officers are not covered by the Statute. Key protections and rights that are granted to nearly all federal, civilian employees by the Civil Service Reform Act of 1978 also do not apply to Transportation Security Officers. They are not entitled to the procedural protections granted by 5 U.S.C., chapter 75. *Brooks v. Dep't of Homeland Security*, 95 M.S.P.R. 464, 469 (2004) (Transportation Security Officers not covered by 5 U.S.C., chapter 75). Nor do they have the right to appeal an adverse action imposed against them by TSA to the MSPB. *Conyers v. Merit Sys. Prot. Board*, 388 F.3d 1380, 1383 (security screeners not covered by 5 U.S.C. § 7701(a)).

One of the very few protections guaranteed to Transportation Security Officers is the protection against whistleblower reprisal granted by the Whistleblower Protection Act, 5 U.S.C. § 2302(b), ("WPA"). Protecting Transportation Security Officers from whistleblower reprisal, of course, makes eminent sense. These officers serve a vital function. They are the primary federal employees responsible for screening passengers and baggage for air travel, thereby protecting the traveling public. *See* TSA, Transportation Security Officer Careers, available at http://www.tsa.gov/careers/transportation-security-officer-tso (last visited Sept. 24, 2014). They are, in many ways, a first line of defense against acts of terrorism.

As such, Transportation Security Officers are also especially well-situated, much like the respondent in this case was, to learn of agency misdeeds and mistakes that create a substantial and specific danger to

public safety. Indeed, while their coverage under the WPA first originated from a memorandum of understanding between TSA and the U.S. Office of Special Counsel, Congress later recognized the critical and necessary protection granted by the WPA when it passed the Whistleblower Protection Enhancement Act ("WPEA"). *See* Memorandum of Understanding Between the U.S. Office of Special Counsel and the Transportation Security Administration Regarding Whistleblower Protections for TSA Security Screeners, available at https://osc.gov/Resources/tsa_mou.pdf (last visited Sept. 24, 2014). The WPEA expressly protects Transportation Security Officers from whistleblower retaliation as a matter of law. 5 U.S.C. § 2304.

Despite, however, the self-evident importance of ensuring public safety and protecting those employees who reveal a substantial and specific threat to that safety, a Transportation Security Officer ("TSO") is just as likely to receive reprisal as accolades for blowing the whistle. *See Aquino v. Dep't of Homeland Security*, 121 M.S.P.R. 35 (2014) (finding TSA removed security screener in retaliation for disclosing mistake that allowed air passengers to bypass security screening procedures). Consequently, AFGE has a deep-rooted interest in this matter and in shielding federal employees from illegal agency retaliation.

BACKGROUND

The crux of this case is that TSA removed Federal Air Marshal Robert J. MacLean for disclosing unclassified information which revealed that TSA had made a grave mistake. That mistake, TSA's ill-advised decision to remove all air marshal coverage from long-dis-

tance flights at a time when TSA was aware of a credible threat to those same flights, created a substantial, specific and imminent risk to public safety.

MacLean learned of TSA's mistake via an unencrypted text message that the agency sent to his personal cell phone, a hijacking alert. That alert was not marked as Sensitive Security Information ("SSI"), an unclassified type of information that is protected from certain disclosures, at the time it was sent. The agency, however, later designated the text message alert as SSI, in the course of justifying and defending MacLean's removal from service. MacLean had first attempted to address his concerns with the agency's decision to leave long distance flights undefended within his chain of command and through the agency's Office of Inspector General. But neither his supervisors nor the Inspector General took any action.

MacLean then, and only then, disclosed TSA's cancellation of air marshal coverage to the media. There was, understandably, a public outcry that subjected TSA to scathing criticism and lasting embarrassment. *See* http://pascrell.house.gov/media-center/press-releases/pascrell-air-marshal-decision-an-abomination (last visited September 21, 2014); *see also* http://maloney.house.gov/media-center/press-releases/dhs-fighting-air-marshals-instead-terrorists (last visited September 21, 2014).

TSA quickly rescinded its cancellation of air marshal coverage and no attack occurred. This incident is not the only time that TSA has been required to reverse course following public and Congressional scrutiny of its poor decision-making. *See* TSA reverses itself: No knives on planes, CBS News, June 5,

2013, available at http://www.cbsnews.com/news/tsa-reverses-itself-no-knives-on-planes/ (last visited Sept. 26, 2014).

When TSA learned that it was MacLean who blew the whistle, it fired him. MacLean eventually, after earlier cases before the MSPB and Court of Appeals for the Ninth Circuit, appealed to the Court of Appeals for the Federal Circuit. The Federal Circuit found that MacLean's disclosure was not specifically prohibited by law and therefore remanded the case to the MSPB for further consideration of MacLean's claim under the WPA. *MacLean v. Dep't of Homeland Security*, 714 F.3d 1301, 1311 (Fed. Cir. 2013).[2]

The Federal Circuit examined the law which TSA asserted forbade MacLean's disclosure, 49 U.S.C. § 40119(b)(1) (2009)[3], and the TSA regulation listing various types of SSI and prohibiting the disclosure of

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[2] The Federal Circuit's non-final remand order, along with the absence of any split among the circuits and factual circumstances that are, in part, unique to the respondent (e.g., TSA's retroactive SSI designation) should have foreclosed the granting of certiorari in this case. *Cf. Rogers v. U.S.*, 522 U.S. 252, 258 (1998) (record should fairly represent the question upon which certiorari was granted). The writ ought to be dismissed as improvidently granted. This case does not clearly present the question of whether agency regulations may ever be "law" under the WPA.

[3] The petitioner notes that although the law briefed and argued below was Section 40119(b), the applicable law was actually 49 U.S.C. § 114(r). Pet. Brief p. 10, n. 2. The petitioner therefore focuses its arguments in this Court on Section 114(r), on the assertion that the legal analysis would be similar under either section. For the sake of clarity, this brief focuses on Section 40119(b), as that is the section that both the parties and the Federal Circuit relied upon.

SSI, 49 C.F.R. § 1520.5(b)(8)(ii) (2005). The lower court weighed both of these authorities against the pertinent section of the WPA, 5 U.S.C. § 2302(b)(8)(A) (2008). The court recognized that the WPA protects a federal employee's disclosure of "a substantial and specific danger to public health or safety" as long as "such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. § 2302(b)(8)(A).

Considering that no Executive order specifically requires that SSI be kept secret, the Federal Circuit found that Section 40119(b)(1) of title 49 did not *specifically* prohibit MacLean's disclosure. *MacLean*, 714 F.3d at 1309 ("The ATSA's plain language does not expressly prohibit employee disclosures[.]"). The lower court also held that TSA's regulation, Section 1520.5, was not a "law" under the WPA because it was, in fact, a regulation. The Federal Circuit found that Section 1520.5's status as a regulation placed it squarely within Congress's articulated intent that the term "specifically prohibited by law" not extend to "internal procedural regulations against disclosure." *Id.*; *see also* H.R. Rep. No. 95-1717 (1978) (Conf. Rep.), 1978 U.S.C.C.A.N. 2860, 2864 (**Specifically prohibited by law "does not refer to agency rules and regulations.**") (emphasis added). TSA petitioned for certiorari, which this Court granted.

SUMMARY OF THE ARGUMENT

The public was safer after MacLean's disclosure than it was before it. This is why a robust and meaningful bar on whistleblower retaliation is paramount.

Nowhere is this truer than when applied to those federal employees, like MacLean, who are in the best position to reveal that which their agencies would prefer remain hidden: agency misdeeds and embarrassing mistakes which cause a substantial and specific danger to public safety.

Yet, whistleblowers face an extraordinarily uphill battle. Before they ever make a protected disclosure whistleblowers must often overcome their own doubts and both societal and employment indoctrination against disclosure. The "blue wall of silence" is more than an inchoate cultural phenomenon, it is a palpable disincentive to disclosure. For those employees who choose the greater good over their own, the risk of adverse employment action is also high, with termination of their employment more often a reality than not. And even whistleblowers who are successful in challenging their termination and bringing their agency's retaliation into the light may have to wait years for relief. *Cf. Chambers v. Dep't of the Interior*, 116 M.S.P.R. 17 (2011) (finding retaliation under the WPA after approximately 7 years of litigation).

AFGE therefore supports MacLean's undistorted reading of the WPA. The Court of Appeals for the Federal Circuit correctly determined that MacLean's disclosure was not specifically prohibited by law. Indeed, it is uncontested that TSA fired MacLean because he exposed TSA's rash decision to remove federal air marshals from long-distance flights at a time when TSA was facing a credible threat of terror on those very same flights. The petitioner concedes that the respondent's disclosure is the very reason that it terminated his employment. Pet. Brief p. 8.

The Federal Circuit, moreover, correctly determined that the plain language and expressed legislative intent of 5 U.S.C. § 2302(b)(8) protects the disclosure of a substantial and specific threat to public safety when that disclosure is not specifically prohibited by law or Executive order. The Federal Circuit likewise got it right when it found: a) that 49 U.S.C. § 40119(b)(1) (2009) does not specifically prohibit anything; and b) that TSA's regulation prohibiting the disclosure of SSI is not a law within the meaning of the WPA, 5 U.S.C. § 2302(b)(8).

A contrary holding would ignore the language of the statute and effectuate the reverse of Congress's intent. It would discourage future whistleblowers from coming forward, and undermine their protection when they did. This is especially so with respect to TSA because, as this case demonstrates, potential whistleblowers would have to contend with the uncertain possibility that TSA might retroactively designate information contained in an otherwise protected disclosure as SSI in order to remove it, and the whistleblower, from the protection of the WPA. The decision of the Federal Circuit should therefore be affirmed.

ARGUMENT

I. MacLean's Disclosure Was Not Prohibited By Law And Allowing TSA Regulations To Dictate Which Disclosures Are Prohibited Would Defeat The Purpose of the WPA and Stifle Future Whistleblowers

Every possible reading of Section 40119(b)(1)(C) demonstrates that law's lack of specificity concerning

which particular disclosures may be prohibited. In pertinent part, the law provides that:

> Notwithstanding section 552 of title 5 and the establishment of a Department of Homeland Security, the Secretary of Transportation shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title if the Secretary of Transportation decides disclosing the information would—be detrimental to transportation safety.

But nowhere does it define the phrase "detrimental to transportation safety." It is an open-ended phrase that does not specifically prohibit any identifiable or describable piece of information. A TSA employee who wished to determine whether a particular disclosure was prohibited by Section 40119(b)(1)(C) could not do so by reference to the law. The law provides no advance warning as to whether a *specific* disclosure is prohibited.

Any attempt by a TSA employee to determine in advance which disclosures are prohibited is further hampered by the fact that in its regulations TSA has arrogated to itself the power to designate *anything* as SSI. While TSA's SSI regulation is specific in a way that the law plainly is not, among the many categories of information designated as SSI by TSA's regulation there is a catchall category: Other information. Other information, according to TSA, is "[a]ny information not otherwise described" in the regulation that TSA or the Department of Transportation determines is SSI. 49 C.F.R. § 1520.5(b)(16). In other words, it is obvious that some things are SSI, but there is no telling in advance what else might be or might become SSI.

The petitioner implicitly concedes this fact by acknowledging that TSA's regulations have added "new categories of SSI" "over the last decade." Pet. Brief p. 5. Even the lengths to which the regulation goes to identify what may constitute SSI underscores the law's lack of specificity because were the statute specific, it would not require such interstitial additions.

The broad sweep of the regulation thus highlights the very risk that Congress intended Section 2302(b)(8) to protect against: that agencies might seek to regulate their way out of the WPA. This is another reason why it is clear and unequivocal that Congress did not intend for the term "law" in the WPA to include "rule or regulation." And the Federal Circuit saying that "[r]egulations promulgated pursuant to Congress's express instructions would qualify as specific legal prohibitions" is just another way of saying that the relevant "specific prohibition" must arise in the first instance from the applicable statute and not from subsequently adopted regulations. *MacLean*, 714 F.3d at 1310. Congress did not intend to allow agencies to self-select which whistleblower disclosures should be prohibited by law.

Specificity is key. Had Congress specifically directed TSA to promulgate regulations prohibiting the disclosure of air marshal deployments, for example, then it is conceivable that whatever regulation TSA drafted might qualify as law for the purpose of Section 2302(b)(8)(A). But that is not what Congress did. Congress instead gave TSA *discretion* to determine which information should be designated as SSI. It is that discretion that ultimately undermines the petitioner's arguments because a grant of discretion is by

definition non-specific. The entire purpose of granting discretion could, indeed, be explained as a Congressional determination to avoid "specificity" in favor of flexibility. This may be all to the good in a broader statutory scheme relying on agency expertise but it cannot overcome the plain language of the WPA. It is simply fallacious to suggest, as the petitioner does, that the phrase "specifically prohibited by law" in Section 2302(b)(8)(A) means exactly the same thing as the much broader phrase "specifically prohibited by law, rule, or regulation."

Further, because the clearly expressed intent of Congress does not conflict one iota with the statutory language that it chose, this Court should apply Section 2302(b)(8) as it is written. For example, any latent ambiguity in Congress's conference committee statement that, "[t]he reference to disclosures specifically prohibited by law is meant to refer to statutory law and court interpretations of those statutes," is removed absolutely by the very next, clarifying sentence: "It [the reference] does not apply to agency rules and regulations." H.R. Rep. No. 95-1717 (1978) (Conf. Rep.), 1978 U.S.C.C.A.N. 2860, 2864. This clarifying statement admits of only one interpretation and that is that agency rules and regulations promulgated through agency discretion do not qualify as "law" under the WPA.

Because 49 U.S.C. § 40119 did not specifically prohibit MacLean's disclosure and because 49 C.F.R. § 1520.5(b)(8)(ii) is nothing more than an agency regulation promulgated through the exercise of agency discretion, MacLean's disclosure was not prohibited by law within the meaning of 5 U.S.C. § 2302(b)(8)(A). Congress is free to change the statutory scheme if it

finds it unworkable, just as the President is free to issue an Executive order prohibiting the disclosure of SSI. But the President has not issued an Executive order, and whenever Congress has changed the WPA's statutory scheme it has done so with an eye toward expanding, not diminishing the act's protection.

Finally, giving effect to the statute's plain language will not have the dire consequences that the petitioner threatens. Successful claims of whistleblower reprisal are not merely there for the taking.

> Pursuant to 5 U.S.C. § 2302(b), to establish reprisal for whistleblowing, the employee must establish four elements: (1) the acting official has the authority to take, recommend, or approve any personnel action; (2) the aggrieved employee made a protected disclosure; (3) the acting official used his authority to take, or refuse to take, a personnel action against the aggrieved employee; and (4) the protected disclosure was a contributing factor in the agency's personnel action. *See Lachance*, 174 F.3d at 1380. If the employee makes this showing, there is still no violation of the WPA if the agency can prove by clear and convincing evidence that it would have taken the same personnel action(s) in the absence of the protected disclosure. 5 U.S.C. § 1221(e)(2).

Chambers v. Dep't of the Interior, 602 F.3d 1370, 1376 (Fed. Cir. 2010). On top of this rigorous framework, the test for determining whether an employee's disclosure of a "substantial and specific danger" to public safety is protected is not so easily overcome. The disclosure may not be vague or speculative. The employee must have "specific allegations or evidence either of actual past harm or of detailed circum-

stances giving rise to a likelihood of impending harm." *Id.* Most claims will fail.

But the petitioner never comes to grips with the gravity of TSA's mistake. The issue here was never a mere policy disagreement. It was a profound lapse in agency judgment that left air passengers and the general public unguarded and vulnerable to imminent attack in the face of an uncontested hijacking alert. Withholding the WPA's protection in this case will therefore have an undeniable chilling effect on future whistleblowers. The next TSO or air marshal who is confronted with a substantial and specific danger to public safety that her agency would prefer she ignore will be in the exact bind that Congress thought it had eliminated with the passage of the WPA: 100% vulnerable to agency retaliation for doing the right thing. The same may be said of employees at other agencies, such as those at the Department of Veterans Affairs who face documented retaliation for disclosing critical lapses in patient care. *See, e.g.*, VA Employees Testify About Retaliation Against Whistleblowers, Washington Post (July 9, 2014), available at http://www.washingtonpost.com/blogs/federal-eye/wp/2014/07/09/va-employees-testify-about-retaliation-against-whistleblowers/ (last visited Sept. 25, 2014). All of these federal employees will be far less likely to come forward if the scope of the WPA's protection is narrowed, which is not what Congress intended.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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September 2014

AMICUS CURIAE BRIEF

No. 13-894

In The Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY,
Petitioner,

v.

ROBERT J. MACLEAN,
Respondent.

On Writ of Certiorari to The United States Court of Appeals For the Federal Circuit

BRIEF *AMICI CURIAE* FOR THE BLACKS IN GOVERNMENT (BIG), THE EMERALD SOCIETY OF THE FEDERAL LAW ENFORCEMENT ASSOCIATIONS (ESFLEA), AND THE FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION (FLEOA) IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The *amici* herein are the Blacks in Government (BIG), the Emerald Society of the Federal Law Enforcement Associations (ESFLEA), and the Federal Law Enforcement Officers Association (FLEOA).[1] BIG was established in 1975 and incorporated in 1976 to address and support the need for African Americans in public service to organize around issues of mutual concern and use their collective strength to address workplace and community concerns. ESFLEA is an organization of American Federal law enforcement officers of Irish heritage. FLEOA is the largest nonpartisan, nonprofit professional association, exclusively representing Federal law enforcement officers. FLEOA represents more than 25,000 Federal law enforcement officers from over 65 different agencies. FLEOA is a charter member of the Department of Homeland Security (DHS) Federal Law Enforcement Working Group, holds two seats on the Congressional Badge of Bravery Federal Board, and serves on the Executive Board of the National Law Enforcement Officers Memorial Fund and the National Law Enforcement Steering Committee. All three organizations have a distinguished and proud history of representing and protecting aggrieved Federal employees before the vast array of government agencies.

The *amici* are compelled to submit this brief to thwart what could be a dangerous and irresponsible attempt by the Petitioner, DHS, to erode and evis-

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the BIG, the ESFLEA, and the FLEOA or its members made any monetary contribution to the preparation or submission of the brief.

cerate the sound policies that gave rise to the Whistleblower Protection Act (WPA), Pub. L. 101-12, 103 Stat. 165 (1989) (codified at U.S.C. § 2302(b)(8)), as amended. The importance of robust protections for government employees in a position to expose waste, fraud, abuse, violations of law, and dangers to public safety cannot be overstated. Indeed, the actions of those individuals who avail themselves of the WPA are often the last stalwarts against corruption, malfeasance, and waste in the government. The present appeal is nothing less than a direct attack on the WPA, with the aim of impermissibly limiting the scope of protection afforded by the Act.

It is the Petitioner's intention to expand the definition of what is "specifically prohibited by law," 5 U.S.C. § 2302(b)(8)(A), to deprive the Respondent, Robert J. Maclean, of WPA protections for his disclosures. Petitioner's position is not only unavailing, but further is in complete contravention of both the plain meaning of the WPA and the intent of its drafters. It is imperative that the WPA be sufficiently concrete to allow potential whistleblowers to know in advance whether their actions are protected. Extending the exceptions to agency-promulgated regulations will not provide potential whistleblowers with the adequate notice that they require and deserve, and it will undercut the WPA's laudable purpose. Without the assurances offered by that blanket of protection, employees will not only be discouraged from exposing waste, fraud and abuse, but will also become the unprotected targets of the retaliation, attacks, and reprisal that the WPA was designed to prevent.

The *amici*, therefore, encourage this Court to affirm the Federal Circuit's decision, holding that

MacLean's disclosure was not "specifically prohibited by law" within the meaning of the WPA.[2]

STATEMENT OF THE CASE

We respectfully refer the Court to the Petitioner's and Respondent's briefs, which succinctly supply the full factual and procedural history of this litigation.

SUMMARY OF ARGUMENT

The present appeal offers a critical opportunity for this Court to clarify and reinforce the underlying protections afforded to whistleblowers pursuant to the WPA. Petitioner DHS asks this Court to expand the definition of what is "specifically prohibited by law," 5 U.S.C. § 2302(b)(8)(A), to include "regulations," effectively eviscerating the protections afforded to whistleblowers.

Petitioner's argument, however, is without merit because it is in complete contravention of the plain meaning of the statute and the congressional intent underlying the WPA. The statute is clear on its face, providing that disclosures are protected if not "specifically prohibited by law." Nevertheless, even if there was some ambiguity as to the intent of the statutory language, the legislative history of the WPA erases any doubts and clearly supports the contention that "specifically prohibited by law" must be narrowly construed to encompass only "statutes" enacted by Congress, and not, as Petitioner wrongfully suggests, "regulations" that are promulgated by agencies. Moreover, any post-enactment activity which has

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[2] This brief is filed with blanket consent of the Petitioner and the Respondent pursuant to this Court's Rule 37.3. Copies of the requisite consent letter have been filed with the Clerk.

been cited by the Petitioner, such as 49 U.S.C. § 114(r)(1), is irrelevant and not a proper consideration when assessing the legislative intent of the WPA.

Additionally, Petitioner's contentions run counter to the crucial fact that the WPA must be sufficiently concrete to give potential whistleblowers ample notice with regard to whether their disclosures are duly protected. Extending the exceptions to regulations will not provide potential whistleblowers with the adequate notice that is required and that they rightfully deserve. Instead, expanding the meaning of "law" to include regulations will undoubtedly leave potential whistleblowers guessing as to whether their disclosure is protected. Potential whistleblowers must be afforded the benefit of knowing — before blowing the whistle — whether their disclosures are protected under the statute. Depriving prospective whitsleblowers of this concrete notice will discourage such individuals in coming forward, and render them more vulnerable to the retaliation, attacks, and reprisal that the WPA was designed to prevent.

Further, Respondent in this case was well within his rights to blow the whistle to the press because his disclosure was not prohibited by law. Even if it was, Respondent was justified in his actions because he, in an abundance of caution, first raised his concerns internally prior to going to the press.

Finally, Petitioner's alarmist arguments as to the public policy considerations are not only contrary to the intent of the WPA, which is to protect whistleblowers and not their employers, but also completely unsupported by any legislative history or findings. Petitioner's allegations are designed to distract this Court from what is essentially a straightforward interpretation of the WPA.

Accordingly, the Court of Appeals for the Federal Circuit's decision must be affirmed.

ARGUMENT

I. THE WHISTLEBLOWER PROTECTION ACT IS CLEAR ON ITS FACE AND ANY DOUBT IS ERASED BY THE LEGISLATIVE HISTORY WHICH SUPPORTS THE CONTENTION THAT THE "SPECIFICALLY PROHIBITED BY LAW" PROVISO DOES NOT ENCOMPASS REGULATIONS.

1. At issue is whether the use of the phrase "specifically prohibited by law," as used in 5 U.S.C. § 2302(b)(8)(A), is broad enough to encompass regulations promulgated by the Transportation Security Administration (TSA) under the authority of the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597 (2001).

The inquiry necessarily starts with the plain language of the statute. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Where the language and purpose of the questioned statute is clear on its face, there is no need to look to the legislative intent but, rather, courts follow the legislative direction embedded in the statue itself. Where the words are ambiguous, the judiciary may properly look to legislative history to reach a conclusion. *See United States v. Pub. Utilities Comm'n*, 345 U.S. 295, 315-16 (1953); *see also Johansen v. United States*, 343 U.S. 427, 432 (1952); *Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 243 (1952); *Feres v. United States*, 340 U.S. 135 (1950).

When interpreting a statute, however, courts must consider not only the plain meaning of each word, but also the placement and purpose of the language within the statutory scheme. *See Bailey v. United States*, 516 U.S. 137, 145 (1995). The meaning of statutory language, plain or not, thus depends on context. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994). Here, "specifically prohibited by law" follows "violation of any law, rule or regulation." 5 U.S.C. § 2302(b)(8)(A). In the context of the statute, it is clear and unambiguous that "law" is not as broad as "law, rule, or regulation." *Id.* Any other reading would render the use of "rule" and "regulation" superfluous. Equally clear is the fact that Congress, in enacting the statute, was consciously distinguishing between the phrases "specifically prohibited by law" and "violation of any law, rule, or regulation." Therefore, any interpretation of the WPA which purports to include the regulations promulgated under the ATSA within the coverage "specifically prohibited by law" is clearly contrary to the plain language of the statute.

In *United States v. Missouri Pacific Railroad Co.*, 278 U.S. 269, 277-78 (1929), this Court made the following observation when urged to construe a statute which, like the one in the present case, contained no ambiguity:

> The language of [the] provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construc-

> tion. Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation.

It is clear from the statutory language that "specifically prohibited by law" does not include regulatory prohibitions and, therefore, no presentation of legislative history or investigation of congressional intent is needed. Cannons of interpretation require that when a law's meaning is clear on its face, that meaning is determinative. Statutory language is written, debated, revised, passed by Congress, and then signed into law by the President. It is not the place of the judiciary to redefine or reinterpret the clear meaning of statutory language. As such, the courts should only turn to legislative history when presented with ambiguity in a law's meaning.

2. Petitioner, without basis, appears to have magically intuited a congressional intent to limit the protections afforded to whistleblowers under the WPA by including disclosures prohibited by regulation in the language "specifically prohibited by law." Pet'r Br. 13. Claims of congressional intent to include disclosures prohibited by regulation are completely unsupported by the relevant legislative history. Petitioner goes so far as to state that absent a "'clear showing' of contrary congressional intent, the phrase 'by law' is presumed to include both statutes and substantive regulations..." Pet'r Br. 13 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979)).

Petitioner's woefully inaccurate interpretation of legislative history renders it necessary to delve into the legislative history of the WPA's use of the phrase "specifically prohibited by law." The extensive legislative history from the statute's predecessor, the Civil Service Reform Act of 1978, Pub. L. 95–454, 92

Stat. 1111 (1978), clearly, unequivocally, and most adamantly states that the purpose of the law is to offer broad protections for whistleblowers and exclude regulations from the inclusion in the phrase "specifically prohibited by law." *See* S. Rep. No. 95-969, at 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743.

Two of the specific goals cited in the 1978 Senate report were: (1) developing broad categories of protected disclosures, and (2) "narrow[ing] the proviso for those disclosures not protected" under the statute. *Id.* Indeed, these intentions are reflected in the statutory language itself. Specifically, the WPA's protected disclosures are evidence of "any violation of any law, rule, or regulation." Disclosures which are not protected include those that are "specifically prohibited by law" and those "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. § 2303(b)(8). As the Federal Circuit noted, the Senate specifically rejected broadening the statutory language to include regulations. *See MacLean v. Dep't of Homeland Security*, 714 F.3d 1301, 1301 (Fed. Cir. 2013). The Senate Committee was concerned:

> That the limitation of protection in S. 2640 to those disclosures 'not prohibited by law, rule or regulation,' would encourage the adoption of internal procedural regulations against disclosure, and thereby enable an agency to discourage an employee from coming forward with allegations of wrongdoing. As modified the limitation has been narrowed. Those disclosures which are specifically exempted from disclosure by a statute which requires that matters be withheld from the public

> in such a manner as to leave no discretion on the issue, or by a statute which establishes particular criteria for withholding or refers to particular types of matter to be withheld, are not subject to the protections of this section.

S. Rep. No. 95-969, at 22, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743.

Undoubtedly, Petitioner has seized upon the fact that the Senate report includes the words "prohibited by statue" and erroneously interprets the substitution of "prohibited by law" in the actual statute as evidence of a congressional intent to broaden the scope of prohibitions to include regulatory prohibition. Pet'r Br. 11, 26, 32. The legislative history clearly indicates this would be a misinterpretation.

On October 5, 1978 the House of Representatives and the Senate issued a joint explanatory statement addressing the use of the word "law" in lieu of "statute" in 5 U.S.C. § 2302(b)(8)(A). This statement emphatically supports Respondent's interpretation of the WPA. The joint report offers great insight into Congress' intent. There is no question that in this instance the words "statute" and "law" are synonymous. *See* H.R. Conf. Rep. No. 95-1717, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864. The Senate bill provided that it was "prohibited to take or fail to take a personnel action as a reprisal for disclosure of a certain information if such disclosure is not specifically prohibited by statute or Executive order;" whereas the House provision stated that "an employee would not be protected against reprisal for a disclosure of information if such disclosure is specifically prohibited by law or if such information is specifically required by Executive order to be kept secret in the interest of national defense of the

conduct of foreign affairs." *Id.* In commenting upon the use of the House version of the bill with regards to the language "specifically prohibited by law," the joint report states:

> The conference substitute in Section 2302(B)(8)... adopts the House provision concerning disclosures not specifically prohibited by law in the interest of national defense or the conduct of foreign affairs. The reference to disclosures specifically prohibited by law is meant to refer to statutory law and Court interpretations of those statutes. It does not refer to agency rules or regulations.

H.R. Conf. Rep. No. 95-1717, at 5, *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864.

Accordingly, the congressional intent to protect disclosures, such as those made by Respondent, is stated outright. The Senate and House both declare that prohibited by "law" means exclusion from whistleblower protection under the WPA for disclosure of information prohibited by a congressionally-passed statute and not an agency-promulgated regulation. Therefore, both the plain language of the statute and the legislative history support Respondent's assertion and the Federal Circuit's conclusion that Respondent's disclosures were not "specifically prohibited by law."

3. Petitioner's complete failure to properly acknowledge Congress' true intent as to the scope of WPA's protection reaches an even higher level of desperation with its flawed and dubious reliance on a 2009 amendment of 49 U.S.C. § 114(r)(1). DHS suggests that another statutory development, by a different Congress, years after WPA was passed, can and should comfort this Court that Congress was

cognizant at all times as to the breadth of protection under WPA and when appropriate did something about it: "To the extent any concern exists that the TSA might apply Section 114(r) in an overbroad manner calculated to deter legitimate disclosures, Congress can address—and has, in fact, addressed—that concern." Pet'r Br. 41.

Such a contention is beside the point. The issue is not whether Congress can and should be trusted to act when needed to ensure the continual vitality of the WPA. Rather, the question before the Court is whether Congress already has addressed the issue through the "specifically prohibited by law" exclusion clause when the WPA was enacted.

Petitioner's reliance on a 2009 amendment ignores this Court's often articulated observation that post-enactment legislative history is a suspect means of elucidating the intent of a law. *See e.g., Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.") (citing *Jones v. United States*, 526 U.S. 227 (1999); *United States v. Mine Workers*, 330 U.S. 258, 281-82 (1947)); *see also Bruesewitz*, 131 S. Ct. at 1092 ("To be sure, postenactment legislative history created by a subsequent Congress is ordinarily a hazardous basis from which to infer the intent of the enacting Congress.") (Sotomayor, J., dissenting) (citing *Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990)).

Moreover, if post-enactment activity were to be of any guidance, it would actually undermine Petitioner's central position. After the enactment of the WPA in 1989, Congress has repeatedly acted in a manner to strengthen and further the protections afforded to

whistleblowers. For example, in 1994, Congress reinforced WPA protections by unanimous vote. *See* An Act To Reauthorize The Office Of Special Counsel, And For Other Purposes, Pub. L. No. 103-424, 108 Stat. 4361 (1994). Most recently, Congress passed the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465 (2012), "to reform and strengthen several aspects of the whistleblower protection statutes in order to achieve the original intent and purpose of the laws." S. Rep. No. 112-155, at 3-4 (2012), *reprinted in* 2012 U.S.C.C.A.N. 589, 591-92. Notably, according to the remarks by the Hon. Todd Russell concerning the WPEA, "agencies must not be allowed to circumvent whistleblower protections through so-called 'secrecy' regulations, such as a new category of information (labeled 'Sensitive Security Information') created by the Department of Homeland Security." 158 Cong. Rec. E1664-01 (daily ed. Sept. 28, 2012) (statement of Hon. Todd Russell).

Hence, each legislative history contention raised by the Petitioner undercuts not only its position, but also its credibility. Ultimately, however, this Court need not concern itself with the 2009 amendment of Section 114(r) or any other post-enactments of the WPA. The language of the law is sufficiently clear and the exclusion sought to be imposed by the Petitioner is improper.

II. PETITIONER'S CONTENTIONS PLACE AT RISK THE PROSPECTIVE WHISTLEBLOWER'S RIGHT TO NOTICE OF WHETHER HIS OR HER DISCLOSURES WILL BE PROTECTED.

1. When preparing to blow the whistle on government wrongdoing, the whistleblower must be afforded the opportunity to know, before disclosure of the information, whether he or she will enjoy whistleblower protection. A whistleblower, reading the plain language of 49 U.S.C. § 114(r)(1)(C), could not understand that disclosure of information marked "SSI" would fall outside the bounds of whistleblower protection.

The phrase "specifically prohibited by law" follows language referring to "a violation of any law, rule, or regulation." 5 U.S.C. § 2302(b)(8)(A). The whistleblower's reading of the plain language of the statute would evidence that a regulation was both different from law and not a valid prohibition against whistleblowing, as the only other exception to the protection afforded such disclosures is where the information disclosed is "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." *Id.* It is clear that Congress directed the government employee to consult two specific sources — statutory law and Executive orders — before making a decision about whether to blow the whistle on agency wrongdoing. To interpret the plain language of 5 U.S.C. § 2302(b)(8)(A) to mean that the employee must also consult the agency's own regulations beforehand is both counterintuitive and in contradiction with Congress' communicated concerns with internal agency-promulgated rules designed to punish gov-

ernment employees who expose corruption. 135 Cong. Rec. H750 (daily ed. Mar. 21, 1989) ("It is obvious, but worth noting, that no Executive order, regulation, or contract can extinguish the rights provided under section 2302 of title 5.")

2. It is axiomatic that, not only must a law exist to prohibit the disclosure, but that law must also be "specific" as to the prohibition. According to the Senate report, the prohibiting statute must describe the prohibited disclosures in such a way "as to leave no discretion on the issue, or by a statute which established particular criteria for withholding or refers to particular types of matters to be withheld." S. Rep. No. 95-969, at 22, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743.

Contrary to Petitioner's argument, 49 U.S.C. § 114(r)(1) does not prohibit any specific disclosures, it merely affords the Under Secretary of TSA the authority to prescribe regulations prohibiting disclosure. Pet'r Br. 13. The law does not state that the forthcoming regulations will be afforded the force and effect of "law" for purposes of the WPA, nor does it list the information that will be covered by the forthcoming regulation. Congress' intentional phrasing of "specifically prohibited by law" means just that; the law must specify what the would-be whistleblower cannot disclose. Here, the law empowers DHS to create regulations; but the law itself does not set forth any restriction against disclosure.

Even assuming for the sake of argument that the SSI regulation promulgated by Petitioner could be afforded the same force and effect as a "law," both 49 U.S.C. § 114(r)(1) and 49 C.F.R. § 1520 fail to rise to the level of specificity required to place the employee on clear notice of the information he or she cannot

disclose. If one were to accept Petitioner's petition that "regulation" can mean "law" for purposes of the WPA, before blowing the whistle, a prospective whistleblower would have to first read the statute, then cross-reference TSA's regulations (promulgated pursuant to 49 U.S.C. § 114(r)(1)) and its implementing policy to determine whether the subject matter of his or her disclosures would run afoul of the agency's categorization of SSI.

In this case, Respondent's applicable guidance at the time of his disclosure was a TSA publication entitled: "Interim Sensitive Security Information (SSI) Policies and Procedures for Safeguarding Control" (Interim Policies).[3] Respondent (and any similarly situated TSA employee) would have consulted this document (which sets forth and purports to clarify the categorizations of SSI found at 49 C.F.R. § 1520) before making the decision to disclose. Indeed, this was the only information that could shape Respondent's understanding of what fell within the agency's newly-designated scope of SSI.

Review of DHS' own scant Interim Policies only bolstered Respondent's belief that the subject text message did not qualify as SSI. DHS sent Respondent the unencrypted subject text message through an unsecure cell phone (as opposed to his secure Personal Digital Assistant), in violation of Section 4(23)(c) of the Interim Policies. At the time of transmission, DHS did not mark this information as SSI, nor did it safeguard the information through password protection or include a limited distribution

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[3] *See TSA Interim Sensitive Security Information (SSI) Policies and Procedures for Safeguarding Control* (November 13, 2002). Entire document available at http://fas.org/sgp/othergov/ssi-safeguard.pdf.

statement with the transmission, in violation of Interim Policies Sections 23(a), 23(c), and 1. In this circumstance, where the statute itself does not specify how the employee should distinguish the information that cannot be disclosed, he must be able to examine and apply the guidance his agency has provided in order to make a decision about whether to disclose. DHS failed to follow at least four of its own policies governing dissemination of SSI in 2003 when it disseminated the text (which purportedly contained SSI) to Respondent, demonstrating that even DHS did not categorize this information as SSI.

Petitioner, now, however, argues that Respondent should have disregarded DHS' failure to treat the information as SSI and made his own independent determination that the information did, in fact, contain SSI. Placing this onerous judgment call squarely on the prospective whistleblower is a far cry from the "specific prohibition" called for by 5 U.S.C. § 2302(b)(8)(A).[4] Congress' intent was to avoid placing the prospective whistleblower in the position of having to guess whether his disclosures would be protected and against permitting an agency to exempt disclosures from protection in order to facilitate

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[4] Notably, misidentification of SSI has been a long-standing, systematic problem within TSA. On October 14, 2004, TSA issued a memorandum stating, in relevant part, as follows: "identification of SSI has often appeared to be ad-hoc, marked by confusion and disagreement depending on the viewpoint, experience, and training of the identifier." We believe this statement speaks to the need for specialized training for all those who designate materials as SSI. *See* U.S. Government Accountability Office Report to Congressional Requestors, *Clear Policies and Oversight Needed for Designation of Sensitive Security Information* at Page 11 (June 2005). Entire report available at http://www.gao.gov/assets/250/246897.pdf.

employee retaliation. Allowing the Petitioner to categorize disclosures (concerning its own wrongdoing) as disclosures not protected by the WPA creates a situation where the agency is at liberty to mark nearly any information as SSI, at any time, in order to ensure that its wrongdoing is not brought to light.[5] Moreover, even if wrongdoing is exposed (as was in this case), treating 49 C.F.R. § 1520 as a "law" for purposes of the WPA will allow DHS to punish a whistleblower while hiding behind the guise of protecting disclosure of SSI.

As such, Respondent's disclosure was not specifically prohibited by law. Even assuming, *arguendo*, that the disclosure was prohibited by law, such a prohibition was not sufficiently clear so as to place Respondent on notice that it was prohibited. According-

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[5] On May 29, 2014, Andrew Colsky, former TSA Director of the Office of SSI, testified before the Committee on Oversight and Government Reform, concerning TSA's overuse of SSI in order to avoid disclosure of information that may be embarrassing to the TSA. Colsky testified, in part, as follows: "[T]here was information in the responsive documents that was not by any stretch of the imagination at all SSI, but was either embarrassing or was something that they just didn't want the other side to know. And there was **extreme pressure** from again I'll use the term 'front office' to mark it as SSI." *See* Committee on Oversight and Government Reform, *Pseudo-Classification of Executive Branch Documents: Problems With the Transportation Security Administration's Use of the Sensitive Security Information (SSI) Designation,* Joint Staff Report at 12 (May 29, 2014) (emphasis in original). Entire report available at http://www.scribd.com/doc/230834546/Bipartisan-full-congressional-oversight-committee-calls-Robert-MacLean-a-whistleblower-and-cites-TSA-abuse-of-SSI-May-29-2014. Notably, Mr. Colsky was the individual who issued the Order marking the text message at issue in MacLean's case as SSI, some three years after it was disseminated.

ly, Respondent was under no obligation to remain silent or report internally under the provisions of the WPA.

III. RESPONDENT WAS JUSTIFIED IN GOING TO THE PRESS IMMEDIATELY, BUT VOLUNTARILY COMPLIED WITH THE INTERNAL COMPLAINT PROCESS EVEN THOUGH HE WAS NOT OBLIGATED TO DO SO UNDER THE WPA.

1. DHS overstates the Respondent's obligations to follow through or comply with any internal complaint process. It is undisputed, and Petitioner has expressly conceded, that if the disclosure of information is not specifically prohibited by law, any employee "may go public with the information." Pet'r Br. 35 (citing 5 U.S.C. § 2302(b)(8)(A)). It is the Respondent's position that the disclosure was not specifically prohibited by law for the reasons outlined above (a position also supported by the *amici* herein). Hence, if the Court is in agreement, any contentions that pertain to the necessity of any partial or complete exhaustion of internal complaint procedures are rendered moot and irrelevant.

Even assuming, *arguendo*, that an internal complaint had to be first maintained, Petitioner has failed to proffer any proof or substantiate any argument that such a requirement was not fulfilled. Section 2302(b)(8) states that any employee who wishes to avoid disciplinary action may go either "to the Inspector General of the [Agency] or another employee designated by the head of the Agency to receive such disclosures" or "to Special Counsel," who

operates independently of the agency. 5 U.S.C. § 2302(b)(8)(B).

Here, Respondent was well within his rights and the WPA's protection to go directly to the press. However, in an abundance of caution and presumably out of respect for the Agency, it is undisputed that Respondent did report his concerns internally before going to the press. As such, Respondent acted in concert with his conscience, common sense, and the provisions of the WPA. Respondent was briefed on a potential plot to hijack the U.S. Airliners in July 2003. Soon after that briefing, the Agency sent the unencrypted text at issue to air marshals. The text cancelled "all overnight missions" for several days. Resp't Br. 10, n. 4. Respondent, though undoubtably concerned and distraught, did not immediately run to the press. Instead, MacLean expressed to his supervisor his fear at leaving so many flights vulnerable during a period of heightened danger. Resp't Br. 10. Respondent was told that "nothing could be done." *Id.* When the supervisor did not adequately address the issue, Respondent then went to the Office of Inspector General (OIG), an option available under the WPA. Respondent's call to that office was transferred to another OIG field office where he was, for all intents and purposes, told to simply "walk away" and think about "the years left in [his] career." *Id.* at 11.

Petitioner has not identified how these actions were insufficient under Section 2302(b)(8). Indeed, it has not stated what further steps should have been taken to meet the requirements of the law. Instead, Respondent did exactly what he was supposed to do under the WPA — not turn a blind eye to the threat posed to the flying public — even though he was

encouraged to. Rather than identify a required course of action, DHS in its brief reminds the Court of a completely irrelevant fact; that the Respondent's efforts "apparently did not include any attempt to contact the Office of Special Counsel." Pet'r Br. 37. However, as set forth above, contacting the Office of Special Counsel is only one of many ways of disclosing under Section 2302(b)(8). It is an alternative, but not a requirement. These statements by DHS were not happenstance or gratuitous. It is submitted that, instead, they were clearly included so as to create a fiction that there was still some unresolved issue regarding non-compliance with the internal complaint process. Furthermore, it is submitted that they were intended to create, out of whole cloth, a policy argument that heretofore did not exist. In a conclusory fashion, without citation or any support in any legislative history, DHS further remarks that permitting employees to come forward, essentially under any circumstance, would grant to such employees a delegation of authority that Congress would never have intended: "Congress could not have intended the confidentiality of sensitive security information to depend so precariously on the idiosynchratic [sic] individual judgments of each of the TSA's more than 60,000 employees." Pet'r Br. 37.

The irony is that Petitioner has, in making these arguments, substituted its own judgment for that of Congress in exactly the same way that it is criticizing. By attempting to overstate the requirements of internal complaint processes, and imposing and inferring conditions that do not exist under any law, it has undermined WPA protection. Congress has already clearly considered the issue. Its consideration and judgment is set forth in the requirements

under Section 2302(b)(8). Petitioner has not demonstrated that the complaint procedures, even if applicable, were insufficiently followed. In the absence of a demonstrated failure, DHS cannot reasonably contend that the Respondent is not entitled to WPA defense and protection, even if its statutory contentions as to the breadth of the law were valid.

IV. THE PETITIONER IS WRONG TO ASSUME THAT CONGRESS DID NOT CONSIDER ANY PERCEIVED HARM OR POTENTIAL IMPACT OF DISCLOSURES.

1. Petitioner argues that "permitting an employee who discloses SSI to invoke Section 2302(b)(8)(A) as a defense to a resulting employment action would embolden federal employees to disclose SSI and gravely endanger public safety." Pet'r Br. 38. In making this argument, DHS asks the Court to substitute its judgment for the decision Congress made when it struck a balance between statutory limitations on disclosures and whistleblower protections. "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 542 (1940).

Here, the Court need not balance the risks involved because Congress fully considered the implications of limiting disclosures that are not protected to those specifically prohibited by statute. "It is the Committee's understanding that Section 102(D)(3) of the National Security Act of 1947, which authorizes protection of national intelligence sources and methods, has been held to be such a statute. In addition,

disclosures which are specifically prohibited by Executive Order 11652 (relating to classified material) are exempted from the coverage of this section." S. Rep. No. 95-969, at 22, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743-44.

Indeed, Congress was aware that it had the power to specifically prohibit future disclosures under Section 2302(b)(8)(A) and reserved, for itself, that authority because Congress considered the risks inherent in a regime where the agency is both the subject of potential disclosures and the arbiter of which disclosures may be permitted. Thus, the Court should "leave it to Congress to alter that scheme." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 198 (1994).

Section 2302(b)(8)(A) "balanc[es] the need for legitimate protections for whistleblowers and potential whistleblowers with the concern that Government not be endlessly tied up by unfounded complaints from employees with less-exalted motives." 124 Cong. Rec. 27548 (daily ed. Aug. 24, 1978) (statement of Sen. Sasser). As the Federal Circuit observed, the government may "discipline employees who reveal SSI for personal gain or due to negligence, or who disclose information that the employee does not reasonably believe evidences a substantial and specific danger to public health or safety." *MacLean*, 714 F.3d at 1310.

Petitioner makes the assumption that the disciplinary threat under Section 114(r) is a "cold comfort." Pet'r Br. 39. However, Petitioner can find warmth in the fact that Congress, in enacting Section 2302(b)(8)(A), incorporated its own judgment about the benefits of disclosures versus deterring disclosures that the employee does not "reasonably believe

evidences a substantial and specific danger to public health or safety."

Petitioner's alarmist concerns are clearly calculated to create hesitation in the Court from applying straightforward statutory construction principles, as set forth above. It is critical, yet again, to point out that DHS has failed to cite any legal or factual support for its professed fear that the entirety of TSA would fall to its knees if the WPA was given its proper due. No legislative history or findings were proffered to support its fictionalized assessment as to the harms that would spring forth if the Respondent's position was affirmed. DHS' perceived scenarios were literally created out of thin air. For example: "Even information that might not appear on its face to expose a particular security vulnerability (say, the fact a particular federal air marshal will be on a particular flight) could potentiality be exploited to create one. (say, by interfering with the air marshal's ability to make the flight)." Pet'r Br. 39. How this hypothetical scenario could be "exploited" is not articulated, except in an abstract speculative manner and, even more suspect, not identified as an actual concern that Congress considered as part of its assessment of the WPA.

Adopting the Petitioner's tunnel vision approach to the implications of a ruling of this Court in favor of the Respondent, in effect, would leave agencies with blanket authority to retaliate without repercussion, thus forcing potential whistleblowers to choose either their morals or their livelihood, but not both.

When the Respondent's disclosures were published, congressional leaders not only reacted immediately, but in a manner that vindicated the Respondent. Resp't Br. 11. They expressed concern and even

outrage about DHS' decision to pull air marshals from the most threatened flights "to save on hotels," and urged the agency to reconsider. *Id.* at 11-12; *see also* JA59 (statement of Sen. Clinton); JA65 (statement of Sen. Lautenberg); JA72 (statement of Sen. Schumer). In fact, DHS not only rescinded the directive, but they also publically acknowledged that their actions — which MacLean helped disclose — had been "premature and a mistake." Resp't Br. 12. Marshal coverage was uninterrupted, and the potential hijacking threat was averted. *Id.* These actions by Congress were not those of an entity seeking to deter whistleblowers, but one of gratitude and encouragement.

If Congress' intent was to deter, rather than encourage disclosures under the WPA, it certainly could have acted more decisively. If *deterrence* was indeed what Congress was truly focused on when weighing the applicability of the WPA, criminal repercussions would clearly have been available to complete its calculus of cost/benefit. To support this proposition, one need only look to the litany of Federal laws providing criminal liability for breaches of Federal law or for breaches of classified information. *See e.g.*, Counterintelligence and Security Enhancement Act of 1994, Title VIII of Pub. L. 103-359 (codified at 50 U.S.C. §§ 435 *et seq.*).

The illegitimacy of DHS' argument is further confirmed by the Petitioner's comments as to the consequences of a finding in favor of the Respondent. In that regard, it incredulously claims that: "If the Federal Circuit's decision is allowed to stand, the MSPB may well conclude... that the TSA must reinstate Respondent to a position where he will again have access to SSI." Pet'r Br. 41. Contrary to

DHS' contention, that is exactly the type of remedy that should be considered because that is precisely the reason why the WPA was enacted. Stated differently, DHS, in astounding fashion, fails to appreciate that the central tenet of the WPA is to protect whistleblowers; not the agencies or governmental entities for which they work.

There can be no dispute that Congress, in enacting the WPA, recognized the limitations of its own ability to uncover wrongdoing within the "the vast Federal bureaucracy." S. Rep. No. 95-969, at 8, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2730. That is why protections were afforded to employees; to protect those individuals who come forward with disclosures of dangerous activity that otherwise would have fallen through the sieve of that vast bureaucracy that Congress acknowledged existed. For example, this Court has applied remedies such as reinstatement and back pay on numerous occasions when faced with violations of other whistleblower statutes. *See e.g., Lawson v. FMR LLC*, 134 S. Ct. 1158, 1158 (2014) (An employee prevailing in a proceeding under 18 U.S.C. § 1514A(c) is entitled to all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had, but for the discrimination); *English v. General Elec. Co.*, 496 U.S. 72, 76 (1990) (If a violation is found Energy Reorganization Act of 1974, 42 U.S.C. § 5851, the Secretary of Labor may order reinstatement with back pay, award compensatory damages). These remedies exist to deter agencies that improperly retaliate against whistleblowers, not the other way around. Congress has reviewed and considered these issues. The statutory language reflects this. As such, the Peti-

tioner's contentions lack merit and the Court of Appeals for the Federal Circuit's decision should be affirmed.

* * *

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-894

In The

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY,

Petitioner,

vs.

ROBERT J. MACLEAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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INTEREST OF THE *AMICUS CURIAE*[1]

FlyersRights.org writes in support of the Respondent, Robert J. MacLean.

FlyersRights.org was founded in 2007 and currently has more than 40,000 members. It is the largest non-profit consumer organization representing airline passengers in the United States. Focused on consumer activism for airline passengers, the organization advocates for legislation in support of consumers who fly and for improved conditions in air travel more generally.

Amicus have a strong interest in this case based on their familiarity with the issues confronted by air travelers. While advocating for a Bill of Rights for Airline Passengers, FlyersRights.org has worked on a variety of air travel related issues. Of critical concern to its members is air travel safety. This includes both mechanical and operational aspects of safety, as well as concerns regarding airline security. The decision in this case will affect the future safety of airline travelers, as the release of travel related security

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

information will continue to affect the well-being and security of airline passengers over the long term.

SUMMARY OF THE ARGUMENT

Citizens interact with disclosures made by whistleblowers protected by the Whistleblower Protection Act in two ways. The first is a well-established and well-understood response: citizens are part of the feedback loop that puts pressure on government to revise and correct the procedures or actions that led to the disclosed problem. The second interaction is less recognized and has been the subject of less discussion: citizens are actors who have choices as to which risks they encounter and how they encounter them. In this case, that means that the Respondent's disclosures not only led to pressure on the TSA from the media, legislators and the public, but might have also led individuals not to travel because of their perception of additional risk had the TSA not changed course and reversed its decision.

Congress has explicitly recognized the interest that citizens as travelers, as opposed to citizens as citizens, have in disclosures of the kind made by Respondent here, that is, disclosures of potential threats to civil aviation.[2] This recognition, in the form of requirements for guidelines to be issued regarding the

[2] *See* 49 U.S.C. §§ 44905(c), (d) and (e).

appropriate release of threats to civil aviation to citizens, explicitly acknowledges the importance of providing information to citizens as travelers.

The release of this information to citizens is likely to have an effect on how those citizens act in their role as travelers. Research shows that citizens react to perceptions of risk in making and altering their travel plans. Receipt of information regarding specific threats to, or systemic failings in, the aviation travel system, will undoubtedly allow those citizens to alter their plans and exercise some level of control over their perceived exposure to risk in these situations.

This interest, not yet explicitly discussed in this appeal, supports the decision of the United States Court of Appeals for the Federal Circuit in this case. The interests of citizens as travelers push the calculation toward one that favors disclosure, rather than one that disfavors it. Thus, while not determinative, these interests support the holding of the Court of Appeals that the phrase "specifically prohibited by law" does not include administrative regulations. The lower court's holding thus makes more information available, in a manner provided for by Congress, and is supported by citizens' interests in confronting the risks of their own air travel.

ARGUMENT

I. The Interests of Citizens who are Air Travelers Should Play a Role in Determining the Scope of Whistleblower Protection in Relation to Air Safety Concerns

Between July 1, 2013 and June 30, 2014, an average of 1.8 million passengers flew domestically in the United States each day.[3] This number does not include those flying on international flights, and also does not include airline pilots, flight attendants, and other employees who work in the air each day. While these groups of individuals are only loosely joined by their common presence aboard airplanes, for the time they are preparing for flight or are on board our nation's airliners they share a common interest in the safety of their aircraft and the security of the air travel system, as well as a gratitude for the dedication of those who support that system. Where there are dangerous, illegal or wasteful practices that relate to the air travel system, this group of travelers and travel employees has a distinct and recognizable interest in ensuring those situations are both exposed and ultimately corrected. Their very lives may depend on it.

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[3] Bureau of Transportation Statistics, http://www.transtats.bts.gov/ (last visited September 22, 2014). The total number of passengers flying domestically in the United States during this period was 651 million.

The structures in place to identify, prevent, and neutralize threats to air safety are extensive.[4] A variety of agencies and instrumentalities are potentially involved in air safety each and every day. From the Federal Aviation Administration (FAA) to the Transportation Security Administration (TSA), the Federal Bureau of Investigation (FBI), the Department of Homeland Security (DHS), the National Transportation Safety Board (NTSB), the airlines, local law enforcement authorities, intelligence officials and others all work in tandem to gather information and respond to what is discovered in an effort to keep air travelers safe each and every day.

Mistakes happen, however, within the many public and private entities that are dedicated to the pursuit of air safety. Not all of the information concerning threats to civilian air safety is properly handled, not all of the threats to air safety are properly evaluated, and not all of the contingencies are properly addressed. In this context of potential failure, Congress has provided an escape hatch for information that otherwise may remain hidden – intentionally or unintentionally – within the enormity of the federal bureaucracy and the interactions

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[4] *See, e.g.*, Brian F. Havel and Gabriel S. Sanchez, The Principles and Practice of International Aviation Law, Chapter 5: The international law regime for aviation safety and security, Cambridge University Press (New York, 2014); *see also*, Shirlyce Manning, *The United States' Response to International Air Safety*, 61 J. Air L. & Com. 505 (1996).

of the myriad entities involved. The Whistleblower Protection Act (WPA)[5] protections applicable to whistleblowers are intended to provide those with knowledge of dangerous, illegal or wasteful practices in government protection when they release information regarding those practices to the public.

Disclosures by whistleblowers, whether through internal procedures or by release of information to responsible media outlets, may force government to try to fix the perceived breach, often under pressure from the media, the public, and other branches of government. If a public disclosure does occur, an important part of the process is the pressure that citizens bring to bear on government to correct its failures, improve its administration of the law, or halt its abusive practices. Much has been written in this context about the importance of whistleblowers by the media, courts, and scholars.[6] This narrative is almost always a part of events that involve a leak by a whistleblower to the press or to the public.

An account of whistleblowing that assigns it value only as a trigger for the democratic process,

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[5] Whistleblower Protection Act of 1989, Pub. L. No. 101-112, 103 Stat. 16; *see also,* Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1471.

[6] *See, e.g.*, Amanda C. Leiter, *Whistle . . . and You've Got an Audience*, 36 Fordham Urb. L.J. 747 (2009). *See also*, Frederick D. Lipman, Whistleblowers: Incentives, Disincentives, and Protection Strategies, John Wiley & Sons, Inc., 169-189 (Hoboken, N.J., 2012).

however, is incomplete. Whistleblowing causes another significant and important outcome: it causes citizens to take action to protect themselves from injuries that may otherwise have followed from the disclosed government action or inaction. In such cases, the citizen acts on leaked information not in the context of the democratic process – that is, by putting pressure on government to change through the media, public expressions of dissatisfaction, direct contact with legislators, and voting – but rather applies the leaked information in a determination of whether to proceed with or halt a personal course of action. Regardless of his or her ultimate contribution to political discourse resulting from a whistleblower's disclosure, the citizen who learns of disclosed information may use the information to inform immediate, personal decisions, and may base a decision to act or refrain from acting solely on the information disclosed.

It is the potential for personal action in this case that *Amicus* argues should not be overlooked in deciding whether an administrative regulation is a law for purposes of the WPA. The relationship between a disclosure and a potential threat to air safety is relevant to the determination of whether the disclosure is protected under the WPA because air travelers change their travel plans based on information concerning threats to air travel. To the extent that there is room for interpretation, the interests of travelers as travelers – or, in other arenas, investors

as investors, automobile drivers as drivers, farmers as farmers – should be considered when determining that disclosures of information ostensibly prohibited by Transportation Safety Administration regulations are not "specifically prohibited by law," and thus are protected by the Whistleblower Protection Act's provisions. As such, the potential for travelers to act to protect themselves with the information that Mr. MacLean released supports the conclusion of the Court of Appeals for the Federal Circuit that Mr. MacLean's disclosures regarding the air marshal system were not "specifically prohibited by law."

II. Congress Has Recognized the Importance of Air Travelers in Security Related Information Disclosures

As the U.S. Court of Appeals for the Ninth Circuit has noted, the Whistleblower Protection Act's purpose, in relevant part, is to "eliminate wrongdoing within the government. . . ."[7] If elimination of wrongdoing is the motivating factor in protecting employees from retaliatory actions for whistleblowing, then this Court need not concern itself with the effects such disclosures have on the personal actions of those outside of the employment relationship or unable to influence it. The history of Congressional legislation, however, tells a different story. In

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[7] *Rivera v. United States*, 924 F.2d 948, 953 (9th Cir. 1991).

advancing legislation relating to the provision of aviation threat information to travelers, the legislature has explicitly noted the positive effects of notifying travelers of threats so as to allow those travelers to decide whether and under what circumstances to travel.

The public record reflects that Congress recognizes that air transportation safety policy directly impacts individual choices. For example, in considering 2001's Aviation and Transportation Security Act, enacted as Pub. L. No. 107-171, 115 Stat. 597, Representative Pascrell stated: "The American people can be assured that the status quo will not be tolerated . . . because if people do not feel secure, they are not going to get on the planes."[8]

The provisions of federal law that require the President to develop and implement guidelines on notifying the public of threats to civil aviation,[9] and that generally prohibit selectively notifying travelers of threats,[10] also provide strong support for the argument that the disclosure of threats to air safety is intended to inform individual travelers' personal safety decisions.

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[8] Congressional Record, H8303 (Nov. 16, 2001).

[9] 49 U.S.C. § 44905(c). *See* Recodification of Certain U.S. Transportation Laws as Title 49, Pub. L. No. 103-272, 108 Stat. 1207, § 1(e).

[10] 49 U.S.C. § 44905(e). *See* Pub. L. No. 103-272, 108 Stat. 1207, § 1(e).

It is useful at this point to set out the statutory requirement related to the release of threats to civil aviation. 49 U.S.C. § 44905 provides, in relevant part, as follows:

> (c) Guidelines on Public Notice. – (1) The President shall develop guidelines for ensuring that public notice is provided in appropriate cases about threats to civil aviation. The guidelines shall identify officials responsible for –
>
> > (A) deciding, on a case-by-case basis, if public notice of a threat is in the best interest of the United States and the traveling public;
> >
> > (B) ensuring that public notice is provided in a timely and effective way, including the use of a toll-free telephone number; and
> >
> > (C) canceling the departure of a flight or series of flights under subsection (b) of this section.
>
> (2) The guidelines shall provide for consideration of –
>
> > (A) the specificity of the threat;
> >
> > (B) the credibility of intelligence information related to the threat;
> >
> > (C) the ability to counter the threat effectively;

> (D) the protection of intelligence information sources and methods;
>
> (E) cancellation, by an air carrier or the Under Secretary, of a flight or series of flights instead of public notice;
>
> (F) the ability of passengers and crew to take steps to reduce the risk to their safety after receiving public notice of a threat; and
>
> (G) other factors the Under Secretary considers appropriate.
>
> (d) Guidelines on Notice to Crews. – The Under Secretary shall develop guidelines for ensuring that notice in appropriate cases of threats to the security of an air carrier flight is provided to the flight crew and cabin crew of that flight.
>
> (e) Limitation on Notice to Selective Travelers. – Notice of a threat to civil aviation may be provided to selective potential travelers only if the threat applies only to those travelers.

This law requires that the President develop guidelines for civil aviation threat disclosure to travelers in appropriate circumstances, and forbids disclosure to some travelers and not others unless the disclosure is limited to those specifically subject to a particular threat. This provision does not compel government disclosure of threats in all cases, but instead

encourages such disclosure and requires the adoption of procedures designed to ensure that it occurs in appropriate cases. The background of the law provides the context for these requirements.

On December 21, 1988, Pan American Airlines flight 103 was destroyed in midair by a terrorist bomb over Lockerbie, Scotland. The events leading up to plane's destruction involved a number of key security failures,[11] especially on the part of the airline company, Pan Am.[12] Particularly relevant here, however, is that a particular aviation threat was called in to U.S. authorities in the weeks preceding the attack:

> On December 5, 1988, an anonymous caller telephoned the American Embassy in Helsinki, Finland, stating that sometime within the next two weeks a Finnish woman would carry a bomb aboard a Pan Am aircraft flying from Frankfurt to the United States. The caller, who spoke with a Middle Eastern accent, provided names of two individuals who he said would engineer the bombing and who had ties to the Abu Nidal terrorist organization.[13]

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[11] *See, e.g.*, Allan Gerson and Jerry Adler, The Price of Terror, Harper-Collins (New York, 2001); Peter Watson, *In Pursuit of Pan Am*, 2 ILSA J. Int'l & Comp. L. 203 (1995).

[12] *See* Nancy J. Strantz, *From Technology to Teamwork: Aviation Security Reform Since Pan Am Flight 103*, 3 Alb. L.J. Sci. & Tech. 235 (1993).

[13] Report of the President's Commission on Aviation Security and Terrorism, May 15, 1990, at 8.

While the validity of the threat itself remains controversial to this day,[14] how the threat was handled has been thoroughly documented. In the wake of the Lockerbie bombing, as part of the review process ordered by the President, the President's Commission on Aviation Security and Terrorism held hearings and investigated the events leading up to the bombing, including the Helsinki phone call.[15] The Commission found that the threat information was provided to limited persons, including persons in government, who had the opportunity to use the information to alter their travel plans. The information was not provided to the general public or to Pan Am's passengers.[16] "The Victims of Pan Am Flight 103," an organization made up of the family members of the victims of the disaster, lobbied for the adoption of the provisions ultimately contained in 49 U.S.C. § 44905.

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[14] *See* Ms. Aphrodite Thevos Tsairis, *Lessons of Lockerbie*, 22 Syracuse J. Int'l L. & Com. 31 (1996).

[15] *See* Executive Order No. 12686 (August 4, 1989), forming the Commission and charging it with investigating the events that led to the Lockerbie tragedy.

[16] *See* Tsairis, *supra*, note 12.

As part of its review, the Commission proposed[17] and Congress enacted[18] provisions that had, among

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[17] Report of the President's Commission on Aviation Security and Terrorism, May 15, 1990, at 83.

[18] The relevant provisions were originally included in the Aviation Security Improvement Act of 1990, Pub. L. No. 101-604, 104 Stat. 3066 (1990), codified as Federal Aviation Act of 1958, § 321 (49 U.S.C. § 1358d). As originally enacted, the provisions provided as follows:

(c) NOTIFICATION GUIDELINES. –

(1) PUBLIC NOTIFICATION GUIDELINES. – Not later than 180 days after the date of the enactment of this section, the President shall develop guidelines for ensuring notification to the public of threats to civil aviation in appropriate cases.

(2) FLIGHT AND CABIN CREW NOTIFICATION GUIDELINES. – Not later than 180 days after the date of the enactment of this section, the Administrator shall develop guidelines for ensuring notification of the flight and cabin crews of an air carrier flight of threats to the security of such flight in appropriate cases.

(d) RESPONSIBILITIES. – The guidelines developed under subsection (c)(1) shall identify officials responsible for –

(1) determining, on a case-by-case basis, if public notification of a threat is in the best interest of the United States and the traveling public;

(2) ensuring that public notification, when considered appropriate, is made in a timely and effective manner, including the use of a toll-free telephone number; and

(3) canceling the departure of a flight or series of flights under subsection (b).

(Continued on following page)

others, two primary effects: 1) to require that guidelines be developed to address releases of specific aviation threat information to the public; and, 2) to prohibit releasing information to one group of people – such as government officials – while not also releasing that information to the public. Selective release of threat information was no longer to be allowed under the new law,[19] but release was encouraged in appropriate circumstances.

(e) CRITERIA. – The guidelines developed pursuant to subsection (c)(1) shall provide for the consideration of –

(1) the specificity of the threat;

(2) the credibility of intelligence information related to the threat;

(3) the ability to effectively counter the threat;

(4) the protection of intelligence information sources and methods;

(5) cancellation, by an air carrier or the Administrator, of a flight or series of flights instead of public notification;

(6) the ability of passengers and crew to take steps to reduce the risk to their safety as a result of any notification; and

(7) such other factors as the Administrator considers appropriate.

(f) SELECTIVE NOTIFICATION PROHIBITED. – In no event shall there be notification of a threat to civil aviation to only selective potential travelers unless such threat applies only to them.

[19] Aviation Security Improvement Act of 1990, Pub. L. No. 101-604, 104 Stat. 3066 (1990), § 109(f).

There can be little doubt about the policy behind the civil aviation threat notification provisions: passengers should be told, where appropriate, about specific threats to civil aviation so that those passengers can make their own choices, given the risks, about when, how and even if they want to fly. With this statement of federal policy, it is appropriate to consider the implications it holds for situations in which whistleblowers disclose information regarding threats to aviation safety. This is *Amicus's* primary point: where appropriate, passengers should be provided with the information they need to gauge the risks they take when they fly, especially where credible threats containing specific information about airline safety can be provided to them.

Amicus does not argue that the government has a duty to release information regarding all threats to the flying public,[20] nor even a large majority of them. Nor is there any assertion that the civil aviation threat provisions are directly applicable to the situation confronted by Mr. MacLean. Rather, the assertion instead is that where information can be so released, it should be, and this is the policy of the federal government as contained in existing federal legislation.

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[20] *Cf.*, Cynthia Dokas, *A Duty to Warn in Aviation Law: A New Tort Theory in the Aftermath of Pan American Flight 103*, 8 N.Y.L. Sch. J. Hum. Rts. 227 (1990).

III. Travelers Change their Behavior Based on Knowledge of Risks of the Kinds Disclosed by Whistleblowers

Common sense tells us that when air travelers are given information regarding threats to aviation safety, whether these are threats targeted at specific flights or routes, or whether they are more generalized threats that develop from the implementation of administrative policy decisions, a portion of those air travelers will change their plans in an attempt to avoid the risks presented by flying under those circumstances. We need not, however, rely on common sense. The research provides evidence as to how individuals handle travel-related risks, and this data shows that this intuition is, in fact, the case.

Making information available to travelers actually has real world effects, effects that show that information releases can benefit air travelers. While general social pressures, the need for travel, and general perceptions of risks have been shown to affect travel decisions[21] – that is, threat information alone is not necessarily going to be determinative of whether to travel or not to travel in most cases – the logical conclusion is that more direct, specific information

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[21] M.F. Floyd, H. Gibson, L. Pennington-Gray and B. Thapa (2009), *The Effect of Risk Perceptions on Intentions to Travel in the Aftermath of September 11, 2001*, 25, *in*, C.M. Hall, D.J. Trimothy & D.T. Duval (Eds.), Safety and Security in Tourism Relationships, Management and Marketing (pp. 19-38). Mumbai: Jaico Publishing House.

will have an even greater effect on decision-making by travelers.

For example, travelers will avoid destinations that are known terrorist hot spots.[22] Source credibility affects travel decisions,[23] implying that governmental information will have a greater effect than will general news or Internet-based information. While concerns about terrorism can be ameliorated by perceptions of institutional competency, the research makes clear that individuals will do exactly what we expect them to do: change their travel plans when they believe their travel plans are at risk because of the threat of a terrorist attack.

IV. The Interest of Citizens as Air Travelers Supports a Reading of the Term "Law" in the Whistleblower Protection Act that Does Not Include Administrative Regulations or Rulings

The primary issue on this appeal is whether the word "law" as used in the Whistleblower Protection Act includes regulations promulgated by a federal

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[22] Yvette Reisingera and Felix Mavondob, *Cultural Differences in Travel Risk Perception*, 20 J. of Travel and Tourism Marketing 13 (2008).

[23] Lori Pennington-Gray, Ashley Schroeder and Kiki Kaplanidou, *Examining the Influence of Past Travel Experience, General Web Searching Behaviors, and Risk Perceptions on Future Travel Intentions*, 1 Int'l J. of Safety and Security in Tourism/Hospitality 64 (2011).

agency pursuant to Congressional mandate. The United States Circuit Court of Appeals for the Federal Circuit held that the regulations promulgated pursuant to the Aviation and Transportation Security Act are not "laws" as defined in the Whistleblower Protection Act, and that therefore Mr. MacLean's release of information to the media was not "specifically prohibited by law."[24]

The Federal Circuit reasoned as follows:

> We agree with Mr. MacLean that the ATSA does not "specifically prohibit" the disclosure at issue in this case. The ATSA's plain language does not expressly prohibit employee disclosures, and only empowers the Agency to prescribe regulations prohibiting disclosure of SSI "*if the Secretary decides* disclosing the information would be detrimental to public safety." 49 U.S.C. § 40119(b) (emphasis added). Thus, the ultimate source of prohibition of Mr. MacLean's disclosure is not a statute but a regulation, which the parties agree cannot be "law" under the WPA.[25]

The Circuit Court's reasoning reaches the correct conclusion from the perspective of textual analysis and principles of statutory interpretation. Nevertheless, Appellant continues to assert that some ambiguity remains as to whether disclosure of information is

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[24] *MacLean v. Dep't of Homeland Security*, 714 F.3d 1301, 1309 (Fed. Cir. 2013).

[25] *Id.*

"specifically prohibited by law." In response to this assertion, *Amicus* here argues that the federal government's policy encouraging the release of appropriate information regarding specific aviation safety threats to the traveling public provides additional authority that, here, disclosure of such information was not specifically prohibited.

If the release involved information specifically identified in a statute, this argument would not bring its release within the WPA's protections. In a case such as this, however, where the question is whether a regulation should count as "law" for WPA purposes, the public good that results from providing information to travelers pushes the calculation in the direction of protecting that release.

Individual travelers have a recognized interest in receiving information regarding specific threats to airline safety. They act on that information, as well they should. Where there is a choice that allows for the release of specific information, and that choice is consistent with the relevant legislative texts, Congressional intent, and our behavioral understandings, the choice should be made to protect that release under the WPA.

CONCLUSION

The United States Court of Appeals for the Federal Circuit was correct in holding that the ATSA does not "specifically prohibit" the information

released by Mr. MacLean because the prohibition on that release was contained in a regulation and not in a statute. This decision is supported not only by the context and text of the WPA itself, but additionally by the interest of travelers in determining their own destinies. The *Amicus* respectfully requests that the Judgment of the United States Court of Appeals for the Federal Circuit be affirmed, and judgment entered for the Respondent, Robert J. MacLean.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 13-894

Supreme Court, U.S.
FILED
SEP 29 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY,

Petitioner,

v.

ROBERT J. MACLEAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

The Whistleblower Protection Act ("WPA") shields federal employees from discipline or retaliation if they disclose information that reveals "any violation of any law, rule, or regulation" or a "substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A). The Act exempts from its protection any disclosure of information that has been prohibited by Executive Order in the interest of national defense or foreign affairs, and also any disclosure "specifically prohibited by law." *Id.*

The Department of Homeland Security has issued regulations that prohibit the disclosure of 16 categories of unclassified information that, collectively, are known as "Sensitive Security Information" ("SSI"). *See* 49 C.F.R. pt. 1520. The question is whether an employee who discloses SSI for lawful purposes under the WPA may nonetheless be terminated for making a "disclosure [that is] specifically prohibited by law."

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INTEREST OF AMICI CURIAE[1]

Amici are former U.S. Government officials who have served in various capacities in military, diplomatic, intelligence, and other government offices, and who remain committed to advancing our nation's safety and security. The Appendix lists the names of amici and their relevant former and current positions.

Amici respectfully submit this brief in support of the Respondent because their experience leads them to conclude that the Department of Homeland Security's ("DHS") restrictive interpretation of the Whistleblower Protection Act ("WPA") is unnecessary to protect national security or public safety. Indeed, amici fear that DHS's position, if adopted by this Court, would exacerbate excessive secrecy within the Executive Branch, which makes our government less effective.

Amici do not support the public release of classified information, and believe that appropriate limits must be enforced on disclosures made by federal employees. But this case is not about classified information; it is about unclassified information, and the lengths to which executive departments and agencies may go to punish employees who disclose it in alerting Congress, the press, or the public at large about fraud, abuse, or imminent danger. Amici believe

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

that unless Congress explicitly declares otherwise, "sensitive but unclassified" information should not be categorically exempt from whistleblower protection where disclosures have historically helped to expose government wrongdoing and inefficiency, and to prevent great harm to national security.

SUMMARY OF ARGUMENT

The question in this case is whether the WPA allows executive agencies to fire or otherwise discipline their employees for disclosing "Sensitive Security Information" ("SSI"), an amorphous species of unclassified information whose contents are defined solely on the basis of agency discretion. If the position DHS has advanced in this matter prevails, a determination by one bureaucrat that information is "sensitive" will allow the agency to preclude its disclosure indefinitely, and to terminate a whistleblower even where a disclosure saves lives or uncovers criminal behavior. The WPA was not designed to shield so broad a category of information from public disclosure, and this Court should not be persuaded otherwise by the ominous predictions DHS has offered.

The WPA protects the disclosure of information that exposes any "violation of any law, rule, or regulation," "gross mismanagement," or "a substantial and specific danger to public health or safety." *See* 5 U.S.C. § 2302(b)(8).[2] As relevant here, the Act excludes two categories of information from statutory protection: first, any information that is "specifically

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[2] This provision was first enacted in the Civil Service Reform Act, but it is commonly referred to as part of the WPA, and this brief adopts that terminology.

required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs," and second, any disclosure that is "specifically prohibited by law." *Id.* § 2302(b)(8)(A). Although the question presented directly addresses the second exception, it cannot be answered without understanding how both exceptions operate within the context of the national security state.

Congress enacted the WPA, in part, because executive agencies can have little patience for individuals who come forward with embarrassing, dangerous, or unlawful agency practices. The Act's structure serves Congress's aim to eliminate agency discretion to define the types of disclosures that warrant termination or other serious discipline. But Congress has also recognized the need to limit what kinds of information employees may reveal. Thus, the WPA exempts entire agencies that operate in the intelligence community, such as the Central Intelligence Agency and National Security Agency, *id.* § 2302(a)(2)(C), and it excludes specific categories of information such as protected "critical infrastructure information," *see* 6 U.S.C. § 133(a). The WPA has never exempted, however, DHS or its component agency, the Transportation Security Administration ("TSA"), nor has it ever specifically prohibited the disclosure of SSI.

The WPA also relies upon its Executive Order exception to ensure that whistleblower protections do not unduly interfere with national security interests. Presidents have long overseen the federal classification system, which prohibits by Executive Order the public disclosure of information that relates to intelligence, military planning and operations, foreign policy, and other national security interests. DHS

possesses the authority to classify information relating to the safety and security of the transportation system under these orders. *See* Exec. Order No. 13,292, § 1.4(g), 68 Fed. Reg. 15,315 (Mar. 28, 2003); Exec. Order No. 13,284, § 20, 68 Fed. Reg. 4075 (Jan. 28, 2003).

The federal classification system has been criticized for being unnecessarily expansive, but it also contains substantial procedural limitations and safeguards. For example, classified information must be clearly designated by trained individuals known as "classifying authorities," of whom there are only a finite number at any given time, and the classification process includes mandated declassification procedures and meaningful oversight.

Although SSI is not classified under the Executive Order scheme, DHS asks this Court to treat it as such for purposes of the WPA. But DHS's view, if accepted, would grant it more power to exempt information from WPA coverage than the Act vests in the President. While the WPA restricts the President's ability to exempt, via Executive Order, only that information which relates to the national defense or foreign affairs, SSI contains no such limitations. By its own terms, SSI includes confidential commercial and personal privacy information that likely falls outside of the President's national defense or foreign affairs powers.

Although SSI represents a more expansive universe of information than can be classified by Executive Order, it offers few, if any, of the vital procedural protections afforded by the classification process. DHS regulations treat SSI as "secret" upon creation; they do not provide for an automatic "declassification" process; and they offer no limit to what SSI

might cover given the agency's discretion to redefine the category at will.

DHS warns that unless SSI is excluded from the WPA's full protections, federal employees will be "embolden[ed] . . . to disclose SSI," and thereby "put lives at risk." Pet. Br. at 38. Amici's experiences in government have left a markedly different impression. SSI serves valid purposes, and well-intentioned federal employees do their best to protect information that is so defined. Unfortunately, SSI in practice remains ill-defined, susceptible to abuse, and in many ways redundant with other tools that remain available for shielding sensitive information from disclosure. Indeed, much of the information that SSI purports to shield is either classified by Executive Order or specifically precluded from disclosure by existing statutes.

The Executive Branch is not plagued by problems of inflexible authorities, under-classification, or too much information sharing—in each respect, the problem is the opposite. The 9/11 Commission Report famously concluded that excessive secrecy prohibited federal agencies from sharing critical information with each other, and also that "publicity about Moussaoui's arrest and a possible hijacking threat might have derailed the plot." *See* Final Report of the National Commission on Terrorist Attacks upon the United States 276 (2004) (the "9/11 Commission Report"). Along the same lines, the WPA recognizes that national security will not be served by burying reports of imminent public danger or government fraud deep within lengthy internal agency review processes. Had Congress trusted such processes to vindicate the Act's objectives, the WPA would not have protected public disclosures at all.

Exempting SSI from WPA coverage would encourage DHS and other agencies with similar regimes to conceal more and more information within confusing and expansive regulatory categories. Such a result would be inconsistent with the interests of transparency and national security.

ARGUMENT

The WPA protects federal employees who disclose sensitive but unclassified information so long as the disclosure reveals a violation of law, gross inefficiency or danger to public health or safety. The WPA offers such protection here because SSI is not defined or policed by either an Act of Congress or an Executive Order. That interpretation of the WPA, which the Federal Circuit adopted below, is entirely consistent with the design of the federal system that regulates and protects classified information, and it advances the interests of public safety and national security.

SSI was designed to be distinct in every meaningful respect from the Executive Branch's classified information regime, having been created primarily to allow agencies to share certain information without having to comply with requests filed under the Freedom of Information Act ("FOIA"). The structure and history of the classification system as a whole, including SSI's place in it, demonstrate why SSI was not intended, and should not be interpreted, to be exempt from the WPA's protections.

I. THE WPA PROHIBITS FEDERAL AGENCIES FROM DISCIPLINING WHISTLEBLOWERS FOR DISCLOSING INFORMATION THAT THE AGENCY HAS WITHHELD FROM THE PUBLIC BASED ENTIRELY UPON ITS EXERCISE OF DISCRETION

The WPA prevents executive agencies from punishing or intimidating good faith whistleblowers. The structure and history[3] of the Act's narrow exceptions, *see* 5 U.S.C. § 2302(b)(8)(A), reveal Congress's distrust for unbounded agency discretion. Indeed, the context in which the WPA was enacted reinforces that Congress could not have intended to allow agency discretion to define the reach of the Act's protections.

Congress designed the WPA to reduce the problem of excessive secrecy in government by offering federal whistleblowers protections for helping to "uncover and correct administrative abuses." S. Rep. No. 95-969, at 8 (1978) (the "WPA Senate Report"); *see also id.* (seeking to encourage federal employees to "summon[] the courage to disclose the truth"). By the time it enacted the WPA in 1978, Congress was aware of the threat posed by transnational terrorism, and had only recently created legislation to respond to hijackings and bombings of the American airline system. Four years earlier, Congress had enacted the Antihijacking Act and Air Transportation Security Act of 1974, which conferred broad discretion on

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[3] The parties have briefed extensively the interpretation of the WPA's text, and amici do not repeat those arguments here. *See* Pet. Br. 18-34; Resp. Br. 19-47.

the Federal Aviation Administration ("FAA") to institute increased security measures, including to exempt SSI from FOIA disclosures. Pub. L. No. 93-366, § 202, 88 Stat. 409, 417.

When it considered the WPA, Congress was on notice of the FAA's 1976 published regulations defining what would eventually be called SSI. *See* FAA, Release of Security Information, 41 Fed. Reg. 26,579 (proposed June 28, 1976). Notwithstanding the FAA's SSI definitions,[4] Congress considered and chose to exclude from the final WPA exception the words "rules or regulations," added the term "specifically," and unequivocally stated in its joint committee report that the phrase "specifically prohibited by law" "does not refer to agency rules and regulations." *See* H.R. Rep. No. 95-1717, at 130 (1978) (Conf. Rep.) (the "WPA Conference Report").

Moreover, at the time the WPA was enacted, the phrase "specifically prohibited by law" was generally understood to refer to statutory prohibitions that did not depend on the exercise of absolute agency discretion. Just prior to the WPA's enactment, Congress had enacted the 1976 amendment to FOIA's Exemption 3. The amendment permitted agencies to withhold information "specifically exempted from disclosure by statute," but added the proviso "that such statute [] requires that the matters be withheld from the public in such a manner as to leave no discretion

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[4] *See also* Report of the Commission on Protecting and Reducing Government Secrecy, S. Doc. No. 105-2, at 5 (1997) (the "Moynihan Commission Report") ("In 1971, a House subcommittee found no fewer than 62 different control markings being used to restrict the distribution of sensitive unclassified information [that were] . . . not linked to any explicit statutory authority.")

on the issue, or [] establishes particular criteria for withholding or refers to particular types of matters to be withheld." *See* Government in the Sunshine Act, Pub. L. No. 94-409, § 3, 90 Stat. 1241, 1242 (1976) (the "FOIA Amendment"). The purpose of the FOIA Amendment was to "overrule the decision of the Supreme Court in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975)." *See* H.R. Rep. No. 94-1441, at 14 (1976) (Conf. Rep.). *Robertson* held that section 1103 of the Federal Aviation Act of 1958 satisfied FOIA Exemption 3 even though it broadly permitted the agency to "order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public." *See Robertson*, 422 U.S. at 266-67; 49 U.S.C. § 1504.

Prior to the congressional debate and ultimate enactment of the WPA in October of 1978, circuit courts had uniformly concluded that the FOIA Amendment effectively overruled *Robertson*, even for cases that were pending when the Amendment became law. *See, e.g., Am. Jewish Cong. v. Kreps*, 574 F.2d 624, 626-27 (D.C. Cir. Mar. 15, 1978); *Lee Pharms. v. Kreps*, 577 F.2d 610, 614-618 (9th Cir. Jun. 29, 1978). Those courts' decisions adopted the narrow interpretation of "specifically exempted . . . by statute" that a number of courts had applied before *Robertson*. *See, e.g., Stretch v. Weinberger*, 495 F.2d 639 (3d Cir. 1974); H.R. Rep. No. 94-1441, at 14 (1976) (Conf. Rep.) (endorsing *Stretch* result). In the wake of these cases, the Senate's WPA report embraced the FOIA Amendment's narrow interpretation of what constitutes a "specific" statutory exemption, and explained that any qualifying statute under

the WPA must satisfy that standard. *See* WPA Senate Report at 21.

By the time both the House and Senate committees reconciled the meaning of "specifically prohibited by law" in October 1978, therefore, both the courts and Congress understood that the narrow specificity standard applied in all FOIA Exemption 3 cases, including cases filed both before and after *Robertson*. This history best explains Congress's reference "to statutory law *and court interpretations of statute*." *See* WPA Conference Report at 130 (emphasis added). And it shows why DHS's argument—that Congress selected the phrase "specifically prohibited by law" in order to reinstate *Robertson's* holding—is irreconcilable with both judicial and legislative history. *See* Pet. Br. at 28-34.

Congress has since amended the WPA several times. Every time, it has done so to strengthen whistleblower protections, reflecting its desire to encourage public disclosures of agency abuse.[5] In none of these amendments did Congress enact language specifically prohibiting the disclosure of information deemed "sensitive" by the exercise of agency discre-

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[5] *See* Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 2(b), 103 Stat. 16, 16 (1989) ("strengthen[ing] and improv[ing] protection for the rights of Federal employees[] to prevent reprisals"); An Act to Reauthorize the Office of Special Counsel, and for Other Purposes, Pub. L. No. 103-424, 108 Stat. 4361 (1994), H.R. Rep. No. 103-769, at 10 (1994) ("provid[ing] federal employees with greatly expanded whistleblower protections"); Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 ("clarify[ing] the [broad scope of] disclosures of information protected from prohibited personnel practices, [and] requir[ing] a statement in non-disclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections").

tion. The structure and history of the statute shows that Congress wanted the decision to remove whistleblower protection to be made not by the agencies whose mismanagement was subject to exposure, but by Congress and the President. This balance was sensible when the WPA was passed in 1978, and it continues to make sense today.

II. THE WPA'S INCORPORATION OF THE EXECUTIVE ORDER CLASSIFICATION SYSTEM APPROPRIATELY BALANCES THE INTERESTS OF NATIONAL SECURITY AND GOVERNMENTAL TRANSPARENCY

The WPA exempts from the Act's protection the disclosure of all information that is "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. § 2302(b)(8)(A). That exception expressly incorporates the classified information infrastructure through which the President has long protected sensitive national security information. *See* WPA Senate Report at 22 ("[D]isclosures which are specifically prohibited by Executive Order 11652 (relating to classified material) are exempted from the coverage of this section.").

Created by President Roosevelt during World War II, *see* Exec. Order No. 8381, 5 Fed. Reg. 1147 (Mar. 26, 1940), the classified information system encompasses different tiers of classification depending on the level of secrecy required. The system in place at the time of the disclosure in this case incorporated, as it does today, the familiar categories of "Top Secret," "Secret," and "Confidential." Exec. Or-

der No. 13,292, § 1.2(a).[6] These classification levels are the exclusive means for designating classified national security information within the U.S. Government. *See id.* § 1.2(b) ("Except as otherwise provided by statute, no other terms shall be used to identify United States classified information.").

The classification regime has evolved to include comprehensive procedures for categorizing, reviewing, and declassifying national security information. For example, every Executive Order on classification has limited the ability to classify information to high-level national security officials and their direct designees. *Compare* Exec. Order No. 8381 (1940) (vesting classification authority in the Secretary of War, Secretary of the Navy, and the President), *with* Exec. Order No. 13,292, § 1.3 (vesting original classification authority in "agency heads and officials designated by the President in the Federal Register" and requiring agency heads to oversee any delegations of authority on an as-needed basis). This prescribed chain of delegation helps to ensure direct accountability for classification decisions.

Furthermore, information cannot be "classified" unless an officer with classifying authority determines that its unauthorized disclosure "reasonably could be expected to result in damage to the national security," damage which the officer must be "able to identify or describe." Exec. Order No. 13,292,

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[6] Executive Order 13,292, issued by President George W. Bush, was the classification order in effect at the time of MacLean's disclosure in 2003. It has since been replaced by President Obama's Executive Order on classification, Executive Order 13,526. In referring to "the Executive Order," this brief relies on the operative Order of President Bush, except where otherwise noted.

§ 1.1(a)(4). The officer must also follow specific procedural requirements. For example, the classification level must be identified "on the face of each classified document," along with the identity of the classifying authority, the agency and office of origin, a "concise reason for classification," and the date of declassification. *Id.* § 1.6(a). No more information than is necessary in any given document may be classified. *Id.* § 1.6(g). The current classification order creates a presumption in favor of using the lowest possible classification level, and an additional rule that if there is "significant doubt about the need to classify information, it shall not be classified." *See* Exec. Order No. 13,526, §§ 1.1(b), 1.2(c), 75 Fed. Reg. 707 (Jan. 5, 2010). The Order also lays out declassification procedures, which over time have expanded to prevent indefinite classification and create additional oversight of classification decisions. *See* Exec. Order. No. 13,292, §§ 3.1-3.7; Exec. Order No. 13,526, §§ 1.5(d), 3.1-3.7.

Congress has long provided legislative enforcement in support of classification decisions. In addition to incorporating the Executive Order regime into the WPA expressly, Congress has, over time, enacted a variety of statutes that set out serious criminal penalties for disclosing classified information.[7]

DHS has ample authority to classify information under the federal regime. The scope of permissible classification includes information relating to transportation security. *See* Exec. Order No. 13,292, § 1.4(g) (covering information relating to "vulnerabilities or capabilities of systems, installations, infra-

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[7] *See* 18 U.S.C. §§ 793, 794, 798, 1030(a)(1), 1924; 50 U.S.C. §§ 783, 3121.

structures, projects, plans, or protection services relating to the national security"). Both the Secretary of Homeland Security and a senior DHS official have authority to classify information up to the Top Secret level. *See* Exec. Order No. 13,284, § 20, 68 Fed. Reg. 4075, 4077 (Jan. 28, 2003) (authorizing Secretary of Homeland Security to classify information up to Top Secret); DHS, Classified National Security Information, 68 Fed. Reg. 4073, 4074 (Jan. 27, 2003) (designating "senior agency official" at DHS with Top Secret classification authority). The Secretary and senior agency official can delegate that authority to other DHS national security officials so long as the designees do not redelegate their authority. Exec. Order No. 13,292, § 1.3(c); *see also* Office of Inspector Gen., Dep't of Homeland Sec., Reducing Over-classification of DHS' National Security Information 13 (2013) (the "2013 DHS IG Report") (noting that as of 2010, the Secretary had delegated to 25 DHS personnel authority to designate classified material).

Although the executive classification regime contains the protections described *supra*, classification remains much easier than declassification. Institutional and bureaucratic incentives have produced a system in which secrecy too often trumps transparency. This problem has been apparent for decades, yet repeated efforts to reduce over-classification and pseudo-classification have "barely made a dent, and it is not clear that they ever will." David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 Harv. L. Rev. 512, 582 (2013).[8] As the

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[8] *See also The Over-classification and Pseudo-classification: Part I, II, and III: Hearing Before the Subcomm. on Intelligence,*

Secretary of Homeland Security openly acknowledged before he assumed his present position:

> The reality is that it is much easier to classify something than to de-classify it, and there are huge bureaucratic biases against de-classifying something once it is classified. Put 10 national security officials in a room to discuss de-classifying a certain fact. They will all say, I'm for transparency in principle, but at least 7 will be concerned about second-order effects, someone will say "this is really hard, we need to think about this some more," the meeting is adjourned, and the 10 officials go on to other more pressing matters.

Jeh Charles Johnson, Keynote Address at the Center on National Security at Fordham Law School 9 (Mar. 18, 2013), *available at* http://www.documentcloud.org/documents/623760-johnson-speech-to-fordham-ls.html.

Thus, even within a classification system that benefits from carefully designed limitations and procedural protections, incentives remain aligned towards excessive secrecy.[9] However troubling these

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Information, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec., 110th Cong. 7 (2007) (statement of J. William Leonard, Director, Nat'l Archives, Information Security Oversight Office) (concluding, based on a review of "every serious review of the classification system since" 1955, that the U.S. government suffers from a serious over-classification problem).

[9] *See, e.g.*, 9/11 Commission Report at 417 ("Current security requirements nurture overclassification and excessive compartmentation of information among agencies."); Reducing

issues are with respect to classified information, they are far worse with respect to information that is unclassified but controlled by executive agencies.

III. EXEMPTING SSI FROM THE WPA'S PROTECTION WOULD BE FUNDAMENTALLY INCOMPATIBLE WITH THE PURPOSES OF THE ACT

SSI presents far more serious problems than those found in the classification regime. As mentioned above, SSI is a category of unclassified information that is principally administered by TSA. For more than three decades of coexistence with the WPA, neither Congress nor the President has ever specifically exempted SSI from the WPA's reach.

In support of its claim that SSI is exempt from the WPA, DHS relies on 49 U.S.C. § 114(r). But that statute was not designed to address WPA. Rather, Congress sought to exempt SSI from routine document requests that were at that time being lodged and litigated under FOIA. The statute that included what is now Section 114(r) provided:

> *Notwithstanding section 552 of title 5, United States Code, relating to freedom of information*, the [FAA] Administrator shall prescribe such regulations as he may deem necessary to prohibit disclosure of any information obtained or devel-

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Over-Classification Act, Pub. L. No. 111-258, 124 Stat. 2648 (2010) ("An Act [t]o require the Secretary of Homeland Security to develop a strategy to prevent the over-classification of homeland security and other information and to promote the sharing of unclassified homeland security and other information . . . .").

> oped in the conduct of research and development activities under this subsection if, in the opinion of the Administrator, the disclosure of such information would (A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) would be detrimental to the safety of persons traveling in air transportation.

Air Transportation Security Act of 1974 § 316(d)(2), 88 Stat. at 417 (emphasis added). At that time, the scope of what agencies could refuse to disclose under FOIA was unsettled. This provision clarified that whatever ambiguity might define the contours of those FOIA exemptions, the FAA nonetheless retained broad discretion to exempt information from FOIA requests. *See Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 195 (D.C. Cir. 1993) (finding that § 114(r)'s "notwithstanding" language evidenced Congress's intent to allow the FAA to withhold information in response to FOIA requests).

After September 11th, Congress transferred SSI rulemaking authority from the FAA to the newly-created TSA, which was later moved from the Department of Transportation ("DOT") to DHS. *See* Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101(e), 115 Stat. 597, 603 (2001); Homeland Security Act, Pub. L. No. 107-296, § 1601, 116 Stat. 2135, 2312 (2002).[10] With each amendment, Congress preserved the "notwithstanding" language referring to FOIA only, and never added language stating that TSA could prohibit the disclo-

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[10] DOT also uses the SSI designation, pursuant to 49 U.S.C. § 40119(b).

sure of information "notwithstanding" the protections of the WPA.

Congress has never created a specific SSI exemption to the WPA with good reason. Namely, SSI is more problematic, and less appropriate for a WPA exemption, than information classified by Executive Order or clearly prohibited by statute for at least six reasons.

First, SSI is broader as a category than information that may be classified by Executive Order. Current TSA regulations define SSI not only in the terms of its authorizing statute, 49 C.F.R. § 1520.5(a), but as encompassing 16 categories of SSI, *id.* § 1520.5(b)(1)-(16), which extend far beyond information relating to the security of transportation networks. And SSI is not even limited to the categories described in the regulations because of category 16, the catch-all provision, which includes "[a]ny information not otherwise described in this section that TSA determines is SSI under 49 U.S.C. 114(s), or that the Secretary of DOT determines is SSI under 49 U.S.C. 40119." *Id.* § 1520.5(b)(16).

The overbreadth of SSI is apparent from the range of disclosures that would be illegal under DHS's position. One SSI subsection prohibits the disclosure of solicited *or unsolicited* bid proposals from government contractors, including any "commercial or financial information" requested by the government from such contractors. *Id.* § 1520.5(b)(14). Thus, under DHS's interpretation, an employee could face reprisal for disclosing high-level officials' acceptance of bribes—or even a private company's *unsuccessful attempt* to bribe an official—in the process of awarding government contracts. *See id.* § 1520.5(b)(14)(i). Another subsection covers

research and development funded, *accepted, or recommended* by DHS or DOT, meaning that an employee could be fired for revealing the results of an academic study relating to transportation security that has been entirely funded by and completed at a university, so long as DHS or DOT "recommended" the study. *See id.* § 1520.5(b)(15). Similarly, another provision defines SSI as "details of any security inspection or investigation," meaning that after conducting an airport investigation, a TSA employee could face termination for disclosing the diversion of appropriated security funds in order to increase management bonuses, resulting in substandard security practices in an airport. *See id.* § 1520.5(b)(6)(i). By citing these examples, amici do not mean to suggest that SSI covers only information that is ancillary to security. Rather, the point is that Congress could not have intended to allow any agency to exempt such a vast amount of information from the WPA's reach.

DHS's expansive position is difficult to square with the narrow exception the WPA grants to the President to exempt information from disclosure by Executive Order, which is limited to information relating to "national defense or . . . foreign affairs." 5 U.S.C. § 2302(b)(8)(A). If DHS's interpretation of "specifically prohibited by law" is correct, it would mean that Congress granted the Under Secretary for Transportation Security the power to declare a disclosure to be a fireable offense simply by labeling information—including purely commercial or personal privacy information—as sensitive, even where there is no connection to national security or foreign affairs. *See* 49 U.S.C. § 114(r) (vesting authority to promulgate SSI regulations in the Under Secretary).

It seems unlikely, if not implausible, that Congress intended the phrase "specifically prohibited by law" to vest in sub-Cabinet agency heads greater authority to prohibit disclosures than the WPA grants to the Chief Executive.

Second, while information is not "classified" until a trained national security official judges and marks it as such, *see* Exec. Order No. 13,292, §§ 1.3, 1.6, 5.4, SSI is "born" into that designation before, and even entirely in the absence of, any determination by an expert in national (or transportation) security. *See* Mitchel A. Sollenberger, Cong. Research Serv., RL32425, Sensitive Security Information and Transportation Security: Issues and Congressional Options 6 (2004). Regardless of how a document is created, *any* DHS employee or covered person, including certain private individuals, at *any* time, may determine that a document falls into one of the 16 SSI categories. *See* 49 C.F.R. § 1520.7 (defining "covered persons" as including all employees of DHS and DOT, government contractors, private researchers, and all recipients of SSI); *id.* § 1520.9 (requiring covered persons to protect SSI from disclosure and to mark unmarked SSI).[11] Indeed, this duty applies not only to DHS employees; it extends to any "covered person" who comes across what they should recognize as SSI, regardless of whether that person works for an entirely separate federal agency lacking clear policies regarding SSI. *See id.* §§ 1520.7, 1520.9.

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[11] *See also* Gov't Accountability Office, GAO-05-677, Transportation Security Administration: Clear Policies and Oversight Needed for Designation of Sensitive Security Information 4 (2005) ("TSA's regulations allow anyone within TSA to designate information SSI.").

Third, unlike SSI, the classification system has established tools for labeling classified information in a manner that helps categorize the information's relative level of sensitivity, and for encouraging the sharing of unclassified information. The classification system creates levels of clearance based on the sensitivity of the information—the Top Secret, Secret, and Confidential designations—while SSI has no such tiers. Nor does SSI share the classification system's presumptions for (i) classifying no more information than is necessary, or at the lowest possible level, or (ii) not classifying at all unless there is demonstrable need. *See* Exec. Order No. 13,292, § 1.6; Exec. Order No. 13,526, §§ 1.1(b), 1.2(c). Generally, SSI requires no written justification prior to designation. *See* Exec. Order No. 13,292, § 1.6(a). And whereas a challenge to classification can go to the Interagency Security Classification Appeals Panel, any challenges regarding SSI markings remain entirely internal to TSA. *Compare* Exec. Order No. 13,292, § 1.8, *with* Dep't of Homeland Sec., Mgmt. Directive 11056.1, § VI.C.1, D, F (Nov. 3, 2006).

Fourth, while the standard classification system requires the declassification of documents over time, DHS at the time of MacLean's disclosure in 2003 had set no such time limits. *See* DOT, Civil Aviation Security Rules, 67 Fed. Reg. 8340 (Feb. 22, 2002); *see also* Gov't Accountability Office, GAO-05-677, Transportation Security Administration: Clear Policies and Oversight Needed for Designation of Sensitive Security Information 4 (2005) (the "2005 GAO Re-

port") ("Once a document is designated SSI, it can remain designated as SSI in perpetuity . . . .").[12]

Fifth, unlike classified information, DHS employees will often lack notice as to what qualifies as SSI, which as a designation attaches automatically to certain categories of information. DHS can alter the definition of SSI at any time by issuing a new regulation, and the "catch-all" SSI category may leave employees confused as to the kinds of information that might later be determined to be sensitive even if not originally marked as such. *See* 49 C.F.R. § 1520.5(b)(16). Indeed, in this case, MacLean received the information in question via unsecured, unencrypted text message, and DHS declared it to be SSI only after MacLean had disclosed it for the purpose of whistleblowing. *See MacLean v. Dep't of Homeland Sec.*, 714 F.3d 1301, 1304 (Fed. Cir. 2013).

Sixth, although its creation was authorized by statute, there has never been any criminal penalty for the unauthorized disclosure of SSI; only civil penalties are available. *See* DOT, Civil Aviation Security Rules, 67 Fed. Reg. at 8352; DOT & DHS, Protection of Sensitive Security Information, 69 Fed. Reg. 28,066, 28,075 (May 18, 2004); *cf.* 49 U.S.C. § 114(v) (granting DHS authority to seek civil penalties for violations of agency regulations or orders). Conversely, the unauthorized disclosure of classified information can trigger criminal prosecution, which

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[12] Congress has since required DHS to enact policies to release, "upon request," certain SSI that is three years old unless an exemption applies; thus, absent a FOIA or similar request, information marked SSI remains so indefinitely for whistleblower purposes. *See* Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 525(a)(2), 120 Stat. 1355, 1381-82 (2006).

makes it obvious even in the absence of an express exemption that the WPA's protections would not apply. *See supra* note 7.

Congress's treatment of a separate area of homeland security information, referred to by DHS as "protected critical infrastructure information," or "PCII," further underscores why SSI should not be interpreted as exempt from WPA protection. The Homeland Security Act of 2002 created a procedure for operators of critical infrastructure—such as airports, bridges, and the internet—to submit information regarding infrastructure security weaknesses to DHS, while assuring those participants that their information would not be disclosed. *See* 6 U.S.C. § 133(a).

The statute defines "critical infrastructure information" in specific terms.[13] It also provides:

> Notwithstanding *any other provision of law*, critical infrastructure information . . . that is voluntarily submitted to a covered Federal agency for use by that agency regarding the security of critical infrastructure and protected systems . . . shall be exempt from disclosure under . . . the Freedom of Information Act . . . [and] shall not . . . be used or disclosed by any officer or employee of the United States for purposes other than the purposes of this subtitle . . . .

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[13] "Critical infrastructure information" is information that relates to one of three categories that the statute describes, with considerably more detail than is provided in this note, as potential physical or cyber attacks on critical infrastructure; defenses to potential attacks; and operational weaknesses or repairs that could be exploited in a potential attack. 6 U.S.C. § 131(3).

Id. § 133(a) (emphasis added). An employee who discloses PCII in violation of section 133(a) is subject to termination and can be imprisoned for up to a year. *Id.* § 133(f).

Congress added an exception to the PCII system explicitly permitting DHS and its employees to disclose information that would otherwise be covered by Section 133(a) so long as the information is obtained from an independent source. *See id.* § 133(c) (allowing agency "to use such information in any manner permitted by law"). And to avoid any ambiguity, Congress amended that exception in the Whistleblower Protection Enhancement Act of 2012 to state, "[f]or purposes of this section a permissible use of independently obtained information includes the disclosure of such information under [the WPA]." Pub. L. No. 112-199, § 111, 126 Stat. 1465, 1472; *see also* S. Rep. No. 112-155, at 44-45 (2012) ("[W]hen an employee or applicant covered by the WPA obtains information in a manner not covered by the critical infrastructure information program . . . , disclosure by the employee or applicant of that independently obtained information may be a protected disclosure under the WPA . . . without risk of criminal penalties, even if the same information was also voluntarily submitted to DHS under the critical-infrastructure protection program.").

The PCII statute demonstrates that, even with respect to a category of homeland security information to which Congress attached criminal penalties, it also took care to carve out exceptions where the WPA would still protect disclosures. Given the likely overlap between independently-obtained PCII and SSI, the exception set forth in 6 U.S.C. § 133(c) would make very little sense if Congress understood

SSI to be categorically exempt from the WPA's protections. Furthermore, unlike the broad language in Section 114(r) on which TSA relies for its authority to prohibit the disclosure of SSI, the PCII statute is a clear example of Congress "specifically prohibit[ing disclosure] by law." 5 U.S.C. § 2302(b)(8)(A). It specifies the content that cannot be disclosed, leaving no discretion to the agency. *Compare* 6 U.S.C. § 131(3), *with* 49 U.S.C. § 114(r)(1) (leaving scope of information covered to what the "Under Secretary decides"). And the statute expressly states that federal employees cannot disclose the information except as specified, "notwithstanding any other provision of law." *Compare* 6 U.S.C. § 133(a)(1)(D), *with* 49 U.S.C. § 114(r)(1) (notwithstanding FOIA).

Congress has demonstrated—through PCII, incorporation of the classified information system, and otherwise—that it knows how to eliminate specific categories of critical national security information from the WPA's protections when it so desires. It has never created a specific exemption for SSI. DHS should not be permitted to avoid this reality by reference to SSI regulations that operate entirely at the discretion of the agency and offer none of the procedural protections that apply to the marking and handling classified information.

IV. ALLOWING AGENCIES TO EXEMPT CATEGORIES OF INFORMATION FROM WPA PROTECTION WOULD BE INCONSISTENT WITH NATIONAL SECURITY

Whistleblowing that complies with the WPA increases the transparency and accountability neces-

sary for effective national security governance. DHS's proposal to vest agencies with the power to decide what may be exempted from the WPA is not only unnecessary to protect public safety, it would in fact weaken national security by reducing transparency and accountability.

Excessive secrecy is harmful to national security. "[T]he failure to ensure timely access to government information, subject to carefully delineated exceptions, risks leaving the public uninformed of decisions of great consequence." *See* Moynihan Commission Report at 8; *id.* at XXI ("Excessive secrecy has significant consequences for the national interest when, as a result, policymakers are not fully informed, government is not held accountable for its actions, and the public cannot engage in informed debate."). As the 9/11 Commission concluded, overclassification and a failure to share information across agencies contributed to intelligence gaps in the months before the September 11th attacks. *See* 9/11 Commission Report at 103, 267.

Perhaps unsurprisingly given its lack of clarity or procedural safeguards, SSI has contributed to the problem of excessive government secrecy. SSI has been misunderstood, wrongly applied, and misused to conceal agency mismanagement. In 2004, the Congressional Research Service reported multiple events in which the ambiguous definition of SSI worked to preclude common-sense communication and reporting on security threats. *See* Mitchel A. Sollenberger, Cong. Research Serv., RS21727, Sensitive Security Information (SSI) and Transportation Security: Background and Controversies, 3-6 (2004) ("CRS SSI Report"). In 2005, the Government Accountability Office concluded that "TSA does not

have written policies and procedures, beyond its SSI regulations, providing criteria for determining what constitutes SSI." 2005 GAO Report at 3.

Despite a number of reforms that Congress has enacted to improve SSI management,[14] problems have persisted, and Congress has continued to criticize the "pseudo-classification" that agency markings like SSI exacerbate. For instance, in 2007, a member of Congress was denied the ability to quote from an unclassified DHS survey on domestic radicalization at a public hearing on domestic radicalization because the agency had marked the survey as SSI. *See The Over-classification and Pseudo-classification: Part I, II, and III: Hearing Before the Subcomm. on Intelligence, Info., and Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 110th Cong. 1-2 (2007) (statement of Rep. Harman). And in 2011, DHS's own SSI Office Director admitted that an investigation of one FOIA withholding had revealed information marked as SSI "that was not by any stretch of the imagination at all SSI, but was either embarrassing or was something that they just didn't want the other side to know . . . [a]nd there was extreme pressure . . . to mark it as SSI." H. Comm. on Oversight & Gov't Reform, *Pseudo-Classification of Executive Branch Documents: Problems with the Transportation Security Administration's Use of the Sensitive Security Information (SSI) Designation* 11-12 (2014) (the "2014 Joint Staff Report"); *see also id.*

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[14] *See* Department of Homeland Security Appropriations Act, 2006, Pub. L. No. 109-90, § 537, 119 Stat. 2064, 2088 (2005); Department of Homeland Security Appropriations Act, 2007, § 525, 120 Stat. at 1381-82; Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 561, 123 Stat. 2142, 2182 (2009).

(finding that "TSA officials were inconsistent in the application of the designation—sometimes choosing to release information the SSI Office determined to be sensitive security information while in other instances refusing to release potentially embarrassing information the SSI Office did not consider to merit the SSI designation.").

Although this case concerns SSI, the holding that DHS proposes would result in numerous expansive WPA exemptions. Notwithstanding efforts to control the spread of "Controlled Unclassified Information" ("CUI"),[15] President Obama admitted in 2010 that federal agencies continue to "employ ad hoc, agency-specific policies, procedures, and markings to safeguard and control [CUI]," and that the "confusing patchwork has resulted in inconsistent marking and safeguarding of documents, led to unclear or unnecessarily restrictive dissemination policies, and created impediments to authorized information sharing." Exec. Order No. 13,556, § 1, 75 Fed. Reg. 68,675 (Nov. 9, 2010).

The National Archives' Information Security Oversight Office ("ISOO") has catalogued 22 separate designations that agencies use to withhold CUI. *CUI Registry,* Nat'l Archives, *available at*

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[15] *See, e.g.*, Presidential Memorandum on Guidelines and Requirements in Support of the Information Sharing Environment § 2(c), 2005 Pub. Papers 1863 (Dec. 16, 2005); Presidential Memorandum on Designation and Sharing of Controlled Unclassified Information (CUI), 2008 Pub. Papers 654 (May 7, 2008); Presidential Memorandum on Classified Information and Controlled Unclassified Information § 2(b), 74 Fed. Reg. 26,277 (June 1, 2009); Reports and Recommendations of the Presidential Task Force on Controlled Unclassified Information (Aug. 25, 2009).

http://www.archives.gov/cui/registry/category-list.html. In addition to SSI, these categories include information relating to farming practices, Census data, tax collection, patent information, private information collected by immigration authorities, financial regulation, and foreign trade policy. *See Pseudo-Classification of Executive Branch Documents: Problems with the Transportation Security Administration's Use of the Sensitive Security Information Designation: Hearing Before the Subcomm. on Gov't Operations of the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 27 (2014) (statement of John Fitzpatrick, Director of ISOO) (stating that there are 314 unique citations in law, government-wide policy, or federal regulations that authorize a "vast amount" of controlled, unclassified information). The agencies that control this information respond to incentives not dissimilar from the ones that motivate DHS—a desire to avoid controversial and embarrassing disclosures. If this Court interprets the WPA to allow agencies to use their own CUI designations to bar disclosure by whistleblowers, there will remain scarce information of value that federal employees could legally disclose. This imbalance will harm, not help, national security.

If agencies are allowed to decide for themselves what categories of information warrant WPA exemptions, they will have no incentive to allow public disclosures. The types of disclosures protected by the WPA are invariably embarrassing, and agencies as a general matter prefer to avoid public controversy. Permitting agencies to exempt whole swaths of information from the WPA by virtue of applying an entirely subjective "sensitive" label would effectively allow agencies to fire employees for good-faith expo-

sures of illegal, grossly inefficient, or harmful agency activities. As the Senate Committee considering the WPA in 1978 recognized, the inclusion of "rules or regulations" into the exception would "encourage the adoption of internal procedural regulations against disclosure, and thereby enable an agency to discourage an employee from coming forward with allegations of wrongdoing." *See* WPA Senate Report at 21.[16]

The alternative mechanisms embraced by DHS are no substitute for *public* disclosure. The WPA did not simply seek to inform government lawyers and congressional staffers about agency practices—it hoped to facilitate education that would result in a better informed public, which experience teaches is essential to a secure nation. *See Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Acts of September 11, 2001: Hearings Before the S. Select Comm. on Intelligence and the H. Permanent Select Comm. on Intelligence*, 107th Cong. 683 (2002) (statement of Eleanor Hill, Staff Director of the Cong. Joint Inquiry) ("[T]he record suggests that, prior to September 11, the U.S. intelligence and law enforcement communities were fighting a war against terrorism largely without the benefit of what some would call their most potent weapon in that effort: an alert and committed public.").

Section 2302(b)(8)(A) envisions that whistleblowers will play a limited but vital role in alerting the

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[16] This same view persists. *See* 2014 Joint Staff Report at 22 ("[T]he Administrator has significant latitude in making SSI determinations. This power, combined with the seemingly arbitrary manner in which SSI is labeled, makes it easy for Administrators to play politics with sensitive information.").

public about threats, corruption, and agency mismanagement where internal processes fail. The available alternative mechanisms for public disclosure, such as FOIA, are not well suited to that task. *See* WPA Senate Report at 8; *cf.* Moynihan Commission Report at 53, 62 ("Many who try to use [FOIA]—even to get information in government files about themselves—routinely wait up to several years before they receive a response."); *see also id.* at XXIV ("in 1992 . . . over $108 million dollars was spent simply to process FOIA requests, many of which yielded little or no material that was actually released").

For similar reasons, recourse through the Office of Special Counsel ("OSC") is insufficient to accomplish the objectives of the WPA. Where a whistleblower seeks to disclose information regarding "a substantial and specific danger to public health or safety," submitting to the OSC process would be completely impractical, because such processes have a 15-day evaluation period, whereas a "substantial and specific danger" by its very nature often requires immediate action. *See* 5 U.S.C. § 2302(b)(8); *Chambers v. Dep't of Interior*, 515 F.3d 1362, 1367-1369 (Fed. Cir. 2008) (holding that harm "is sufficiently substantial and specific to warrant protection under the WPA" when it is "likely to occur in the immediate or near future," rather than "a harm likely to manifest only in the distant future."); Pet. Br. at 36 (citing 5 U.S.C. § 1213(b)). Additionally, Congress has in the past found the OSC—itself an executive agency—unable to protect whistleblowers' interests fully. *See, e.g.*, H.R. Rep. No. 103-769, at 14 (1994) (seeking to "free[] whistleblowers from vulnerability to abuses of discretion by the Office of Special Counsel"); S. Rep.

No. 100-413, at 8 (1988) (finding that OSC had focused its interests on "protecting the 'system'" at the expense of "[a]ssuring employees that the OSC's priority is to protect them from reprisal").

Contrary to DHS's representations, Pet. Br. 38-39, applying the WPA to SSI disclosures would not threaten national security or public safety. DHS has clear authority to mark sensitive transportation security information as classified. *See* Exec. Order No. 13,292, § 1.3(c)(3); 2013 DHS IG Report at 13. Indeed, DHS's concerns about transportation system vulnerabilities, and sensitive lists of vital transportation infrastructure assets, Pet. Br. 38, fall within its authority to classify information relating to "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security." *See* Exec. Order No. 13,526, § 1.4(g).[17] The President also has authority under the WPA to issue a new Executive Order specifically prohibiting the disclosure of the core of what constitutes SSI relating to national security under the WPA; and the President could exempt fed-

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[17] To the extent DHS notes concerns with vulnerability reports and assessments of infrastructure assets, it is not SSI but rather the PCII statute, *supra* at 23-25, which provides the relevant framework by which the government most often protects such information from disclosure. *See* 71 Fed. Reg. 52,262, 52,271 (Sept. 1, 2006) (noting that 85% of critical infrastructure information is not held or controlled by the federal government, and thus subject to protection under the PCII framework); DHS, PCII Program Manual 39 (2009), *available at* http://www.dhs.gov/sites/default/files/publications/pcii-program-procedures-manual_508.pdf (noting that transportation vulnerability assessments originated outside of government may be marked as PCII, protected from disclosure, and shared with federal, state, and local governments).

eral marshals' positions entirely from WPA coverage if security concerns warranted such treatment. *See* 5 U.S.C. §§ 2302(a)(2)(B)-(C), (b)(8)(A).

Of course, if Congress actually wanted to exempt from the WPA *all* information that qualifies as SSI, it could do so. Congress has already enacted specific disclosure prohibitions, with accompanying criminal penalties, for a significant amount of information that SSI purports to cover. *See, e.g.*, 6 U.S.C. §§ 131, 133 (critical infrastructure information); 18 U.S.C. § 1905 (prohibiting disclosure of trade secrets and confidential amounts or sources of income, profits, losses, or expenditures); 5 U.S.C. § 552a(b) (prohibiting disclosure, absent written consent, of personal identifying information, including financial, medical or criminal or employment information); *cf.* 42 U.S.C. §§ 2014(y), 2274, 2277 (prohibiting disclosure of "Restricted Data" related to nuclear energy and weapons). Moreover, under the original 1978 WPA, Congress entirely exempted certain agencies from its protections. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 101(a), 92 Stat. 1111, 1115 (excluding from Section 2302(b)(8)(A) coverage "the Federal Bureau of Investigation, the Central Intelligence Agency, . . . the National Security Agency"). Congress has since updated that list to add other agencies, but not TSA or DHS. *Compare* Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 931, 122 Stat. 4356, 4575 (2008) (adding National Geospatial-Intelligence Agency); Whistleblower Protection Enhancement Act of 2012 § 105, 126 Stat. at 1468 (adding the Office of the Director of National Intelligence and the National Reconnaissance Office), *with* Homeland Security Act of 2002 § 883, 116 Stat. at 2247

("Nothing in this Act shall be construed as exempting [DHS] from requirements . . . to provide whistleblower protections for employees of the Department."). Thus, Congress has demonstrated its capacity to protect a significant amount of information that qualifies as SSI from disclosure, but it has never chosen to exempt SSI as a whole.

Finally, the WPA only prohibits an agency from retaliating against an employee for disclosing information under specific, and narrowly circumscribed, conditions. *See* 5 U.S.C. § 2302(b)(8). Courts have strictly interpreted the requirements of Section 2302(b)(8), finding in favor of whistleblowers in only a handful of litigated cases. *See* Peter Eisler, *Whistle-Blowers' Rights Get Second Look*, USA Today (Mar. 14, 2010) (citing Government Accountability Project study that between 1994 and 2010, the Federal Circuit had ruled for whistleblowers in only three of 203 cases decided on their merits, and that between 2000 and 2010, the Merit Systems Protection Board has ruled for whistleblowers just three times in 56 cases decided on their merits).[18] DHS's contention that the Federal Circuit's reading of the WPA will risk lives utterly ignores the cautious manner in which federal employees have invoked the Act's protections in practice.

Congress struck the appropriate balance in 1978 between governmental transparency and accountability, on the one hand, and the need to keep certain

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[18] Throughout the 12-year history of the Transportation Security Administration, there is only one published opinion documenting a TSA whistleblower's successful invocation of Section 2302(b)(8). *See Aquino v. Dep't of Homeland Sec.*, 2014 M.S.P.B. 21, P15-P17 (M.S.P.B. 2014).

national security information secret, on the other. This Court should not disturb that balance by according SSI an across-the-board exemption from the WPA's protections. Making the timely disclosure of important yet unclassified information even more difficult will only serve to harm, not help, national security and public safety.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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APPENDIX

APPENDIX

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AMICUS CURIAE BRIEF

No. 13-894

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY,
Petitioner,

v.

ROBERT J. MACLEAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

NO. 13-894

DEPARTMENT OF HOMELAND SECURITY,

Petitioner,

v.

ROBERT J. MACLEAN,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*[1]

Amici are six Members of Congress from both parties who have taken leading roles in protecting whistleblowers. *Amici* have worked with whistleblowers to root out waste, fraud, abuse, and mismanagement within Execu-

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or their counsel made such a contribution. All parties have filed letters granting blanket consent to the filing of *amicus* briefs with the Clerk.

tive Branch departments and agencies. And they serve on committees with significant oversight responsibilities that frequently rely on information from government employees to discover agency malfeasance. *Amici* have a firsthand understanding of the invaluable role whistleblowers play in helping Congress monitor the federal bureaucracy and guard the public fisc. They know that whistleblowers are more likely to come forward when they can do so without fear of reprisal. *Amici* have thus been active in ensuring that our Nation's laws protect government employees who come forward with information about agency misconduct.

Senator Chuck Grassley (R-Iowa) is a co-author and original co-sponsor of the Whistleblower Protection Act of 1989, as well as the Whistleblower Protection Enhancement Act of 2012. In the next Congress, he will chair the Senate's newly formed Whistleblower Protection Caucus.

Senator Ron Wyden (D-Ore.) will serve as Vice-Chair of the Whistleblower Protection Caucus. He is a co-author of the whistleblower protections granted to members of the intelligence community in the 2014 Intelligence Authorization Act.

Representatives Darrell Issa (R-Cal.) and Elijah Cummings (D-Md.) are the Chair and Ranking Member of the House Committee on Oversight and Government Reform, which has jurisdiction over whistleblower issues. Together they introduced the House version of what became the Whistleblower Protection Enhancement Act of 2012, as well as the All Circuit Review Extension Act.

Representatives Blake Farenthold (R-Tex.) and Stephen F. Lynch (D-Mass.) are the Chair and Ranking Member of the House Oversight Committee's Subcom-

mittee on the Federal Workforce, U.S. Postal Service, and the Census. The Subcommittee has jurisdiction over whistleblower issues.

The legislation *amici* have sponsored reinforced the protections Congress first afforded whistleblowers in 1978. Regrettably, much of that legislation was necessary to overturn decisions by the Merit Systems Protection Board and the Federal Circuit that curtailed whistleblower protections by imposing limitations Congress never authorized.

This time, the Federal Circuit got it right. The decision below properly refused to adopt a new extrastatutory restriction that would allow agencies to shield their own misconduct by exempting certain disclosures from whistleblower protections. In rejecting that anomalous result, the Federal Circuit honored not only the statutory text but also Congress's consistent understanding of the provision in question.

The Department of Homeland Security nonetheless asks this Court to impose the limitation that Congress and the Federal Circuit rejected, and hold that agencies may unilaterally deny whistleblower protections by administratively declaring a disclosure "specifically prohibited." That interpretation would allow agency regulations to erode the statutory protections Congress created for whistleblowers. It would deter disclosure of government misconduct and impair Congress's oversight role. *Amici* have a strong interest in preventing that result.

SUMMARY OF ARGUMENT

By exposing agency illegality, waste, and corruption, whistleblowers provide invaluable assistance to Congress in the exercise of its oversight responsibilities. To ensure that agency employees feel free to come forward, Con-

gress has afforded whistleblowers robust protections against retaliation. Any disclosure of any legal violation, abuse of authority, gross waste or mismanagement, or danger to public health or safety is protected against reprisal unless the disclosed information is classified or the disclosure is "specifically prohibited by law." 5 U.S.C. §2302(b)(8)(A). A disclosure is "specifically prohibited by law" only if it is barred by *statute*, not merely by agency regulations. Allowing agencies to declare disclosures "specifically prohibited" by regulation would defy Congress's design and undermine its oversight role.

I.A. Congress deliberately crafted §2302(b)(8)(A) to exclude agency rules and regulations. It rejected language that would have withheld whistleblower protection from public disclosures that are prohibited by "law, rule, or regulation," out of concern that it would "enable an agency to discourage an employee from coming forward with allegations of wrongdoing." S. Rep. No. 95-969, at 21 (1978). Congress instead adopted a more whistleblower-protective approach, shielding disclosures unless specifically prohibited by *law*. As Congress explained in 1978, "specifically prohibited by law" refers "to statutory law and court interpretations of those statutes. *It does not refer to agency rules and regulations.*" H.R. Conf. Rep. No. 95-1717, at 130 (1978) (emphasis added).

Congress has stood by that understanding ever since. It significantly revised the whistleblower statutes in the Whistleblower Protection Act of 1989 ("WPA"), the 1994 amendments to the WPA, and the Whistleblower Protection Enhancement Act of 2012. At every point, Congress reiterated its understanding that exceptions to whistleblower protections must be created by Congress via statute, not by agencies via regulation. Indeed, the whole point of the WPA regime is to subject agencies to search-

ing scrutiny, not to defer to their judgments about what information Congress—and the public —should receive.

B. The tribunals responsible for interpreting the whistleblower statutes—the Merit Systems Protection Board and the Federal Circuit—have agreed that a disclosure must be prohibited by statute, not regulation, to be denied protection under §2302(b)(8)(A). The Board first adopted that view in 1993. Since then, Congress has repeatedly amended the WPA to overturn Board and Federal Circuit interpretations of other elements of the statute, but it has consistently left that construction of §2302(b)(8)(A) in place. Those actions confirm that Congress approves of the construction.

C. Both the statutory text and the legislative history show that, for a disclosure to be "specifically prohibited by law," Congress must have barred the disclosure with sufficient specificity to give whistleblowers fair notice. Put simply, a whistleblower must be able to tell from reading the statute whether he will be shielded from retaliation if he publicly discloses particular information. The statute the Department invokes here, 49 U.S.C. §114(r)(1), fails that test. Far from providing the requisite specificity, it prohibits, at most, disclosures that would be "detrimental to the security of transportation." That criterion provides no meaningful guidance to a whistleblower who exposes a security shortcoming in order to fix it. The fact that the Under Secretary decides whether a disclosure would be "detrimental" only underscores that it is the agency, not Congress, deciding whether to prohibit the disclosure.

II. The Department's interpretation would interfere with Congressional oversight. Federal agencies have always found ways to keep information under wraps. If agencies could decide which disclosures receive whistle-

blower protections, they would inevitably abuse that power. The result would be to deter whistleblowers and restrict the flow of information to Congress.

A. The Department's interpretation would shrink the universe of information whistleblowers may bring to light. The TSA's Sensitive Security Information ("SSI") designation is but one of dozens of categories of so-called "Sensitive But Unclassified" information ("SBU") whose disclosure is restricted by agency regulations. Under the Department's interpretation, most if not all of those categories would be exempt from §2302(b)(8)(A)'s protections. But significant uncertainty would remain, as SBU designations are often poorly and inconsistently defined.

B. The Department's interpretation would impede Congressional oversight. The burden of confirming that no regulation prohibits disclosure will deter untold numbers of whistleblowers. Allowing regulations to trump whistleblower protections will also increase the risk that employees will be discouraged from disclosing information to Congress. And it will prevent disclosures to the media and other outlets from which Congress often learns of agency misconduct. Congress's pipeline of information would dry up, impairing its ability to oversee the federal bureaucracy.

C. The risk of agency overreach is apparent. Time and again, agencies have found ways to suppress inconvenient information. The TSA itself has misused its SSI designation to withhold embarrassing information. The potential for such abuse is precisely why Congress denied agencies the power to carve out exceptions to the laws that keep agencies in check.

ARGUMENT

Whistleblowers play a vital role in Congressional oversight of the federal bureaucracy. Members of Congress cannot station themselves or their staffs in agency offices to watch for evidence of malfeasance. Nor can they depend on agency officials to candidly self-report all problems arising under their watch. Congress thus relies on individuals working within agencies to supply the information it needs to guard the public purse and give effect to the checks and balances that are essential to the separation of powers. By blowing the whistle, those individuals perform an invaluable public service. They save taxpayers billions of dollars, enhance government efficiency and transparency, and safeguard the public welfare.

Whistleblowing has been a civic virtue for centuries. More than 200 years ago, the Continental Congress resolved:

> That it is the duty of all persons in the service of the United States, as well as all other the inhabitants thereof, to give the earliest information to Congress or other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the services of these states, which may come to their knowledge.

Legislation of July 30, 1778, reprinted in Gov't Printing Office, *Journals of the Continental Congress, 1774-1789*, at 732 (W.C. Ford et al. eds., 1908).

That duty has grown all the more important as our Nation and its government have grown. Modern whistleblowing likely began with Ernie Fitzgerald, "probably the most famous whistleblower of all time." 152 Cong. Rec. S1780 (Mar. 6, 2006) (Sen. Grassley). In 1968, Fitzgerald testified before Congress about the C-5 transport

aircraft program. He revealed that it had run $2 billion over budget, a fact the Air Force had tried to keep quiet. *Ibid.* Fitzgerald was later instrumental in helping Congress crack down on "spare parts overpricing"—*e.g.*, paying $900 for a 34¢ part—saving taxpayers millions. *Ibid.*; see P. Carlson, *A. Ernest Fitzgerald: His Commitment to Cutting Costs Has Made Him No. 1 on the Pentagon's Hate List*, People, Dec. 9, 1985, http://www.people.com/people/archive/article/0,,20092407,00.html.

Valuable as whistleblower disclosures are to helping Congress keep tabs on the bureaucracy, they are often embarrassing to agencies. Rather than celebrate whistleblowers, agencies are apt to treat them "like a skunk at a picnic." 152 Cong. Rec. S1780 (Mar. 6, 2006) (Sen. Grassley). Ernie Fitzgerald, for example, was fired for (as he put it) "committing truth" before Congress. 160 Cong. Rec. S2366 (Apr. 10, 2014) (Sen. Grassley). Regrettably, the reward for rooting out waste and abuse at one's workplace may be a forced search for a new workplace.

Because employees are understandably reluctant to jeopardize their careers, Congress has afforded whistleblowers robust protections. Most significantly, the Whistleblower Protection Act ("WPA") forbids adverse agency action against an employee because of his public disclosure of information he reasonably believes to show "any violation of any law, rule, or regulation," or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. §2302(b)(8)(A)(i), (ii). That protection admits only two narrow exceptions: disclosures "specifically prohibited by law" and disclosures of classified information. *Id.* §2302(b)(8)(A).

Whistleblower protections thus serve as a twofold check on agencies: They directly restrain agencies from retaliating against whistleblowers. And, by doing so, they encourage whistleblowers to come forward with information that helps Congress and the public hold agencies accountable. Those checks would work very poorly indeed if agencies could extricate themselves from §2302(b)(8)(A)'s strictures by administratively declaring certain disclosures "specifically prohibited by law." That arrangement would perversely entrust the scope of whistleblower protection to the very entities against which those protections are directed. That makes about as much sense as a traffic code that lets bad drivers decide which roads police may patrol—none at all.

There is no reason to think Congress created such an ineffectual system. To the contrary, the WPA means what it says—that disclosures are protected unless specifically prohibited by "law," not merely by "rule" or "regulation."

I. Disclosure Is "Specifically Prohibited By Law" Only If It Is Prohibited By Statute

Section 2302(b)(8)(A) is commonly, and properly, understood as a cornerstone of the Whistleblower Protection Act of 1989. But its foundations go deeper. Congress first enacted §2302(b)(8)(A) as part of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. Over the years, Congress has amended §2302(b)(8)(A) and related provisions repeatedly, often to overturn administrative and judicial decisions that diluted whistleblower protections. One thing, however, has remained constant. Congress has long understood that a disclosure is "specifically prohibited by law"—and therefore exempt from §2302(b)(8)(A)'s protections—only where the disclosure has been forbidden by *Congress* via

statute, and not merely by the *agencies* the provision is designed to check.

A. Congress Has Consistently Understood §2302(b)(8)(A) To Require That Disclosure Be Prohibited by Statute

1. *Civil Service Reform Act of 1978*

The Civil Service Reform Act of 1978 ("CSRA") overhauled the federal civil service to be "consistent with merit system principles and free from prohibited personnel practices." CSRA §3(1), 92 Stat. 1112 (5 U.S.C. §1101 note). To ensure fair notice of what is expected of employees and managers alike, Congress declared it "the policy of the United States" that "prohibited personnel practices should be *statutorily defined* to enable Federal employees to avoid conduct which undermines * * * the integrity of the merit system." CSRA §3(2), 92 Stat. 1112 (5 U.S.C. §1101 note) (emphasis added).

Most important here, the CSRA created the first anti-retaliation protections for federal-employee whistleblowers. It forbade agency reprisal against an employee for disclosure of information he "reasonably believes evidences" either "(i) a violation of any law, rule, or regulation" or "(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." CSRA §101(a), 92 Stat. 1116 (codified as amended at 5 U.S.C. §2302(b)(8)(A)). Congress qualified that protection in just two small ways. Under §2302(b)(8)(A)'s proviso, whistleblowers were protected so long as "disclosure is not specifically prohibited by law" and "such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." *Ibid.*

Congress carefully considered § 2302(b)(8)(A)'s proper scope. The original Senate bill contained a broader proviso: It would have barred reprisal "against an employee who publicly disclosed a violation of a law, rule, or regulation, as long as the disclosure itself was not prohibited by any *law, rule, or regulation*." S. Rep. No. 95-969, at 21 (1978) ("*1978 Senate Report*") (emphasis added). That proposal had the virtue of symmetry. But it sparked concerns that limiting protection "to those disclosures 'not prohibited by law, rule, or regulation,' would encourage the adoption of internal procedural regulations against disclosure, and thereby enable an agency to discourage an employee from coming forward with allegations of wrongdoing." *Ibid.* The Senate Governmental Affairs Committee thus amended the proviso to deny agencies that power. Under the revised bill, disclosures would be protected unless "prohibited by *statute* or Executive Order 11652 [concerning classified information], or any related amendments thereto." *Id.* at 154 (emphasis added).

The House bill always took an asymmetric approach. It protected disclosures of "violation[s] of any *law, rule, or regulation*" but withheld protection only for disclosures "specifically prohibited by *law*" (as well as disclosures of information classified pursuant to Executive Order). H.R. Rep. No. 95-1403, at 146 (1978) ("*1978 House Report*") (emphasis added).

Congress ultimately adopted the House version of the proviso. It did so, however, on the understanding that there was no difference between disclosures prohibited "by statute" and disclosures prohibited "by law." In sending the final bill to the two chambers, the Conference Report explained that "[t]he reference to disclosures specifically prohibited by law is meant to refer to

statutory law and court interpretations of those statutes. *It does not refer to agency rules and regulations.*" H.R. Conf. Rep. No. 95-1717, at 130 (1978) ("*1978 Conference Report*") (emphasis added). Congress thus understood that the use of the term "law" rather than "statute" had no impact on § 2302(b)(8)(A)'s scope. In this context, both mean the same thing.[2]

The Conference Report merely made explicit what was already apparent from the provision's text. Section 2302(b)(8)(A) takes an asymmetric approach to whistleblowing. It *protects* whistleblowers in a broad array of cases, including disclosures of violations of any "law, rule, or regulation." But the section's proviso *denies* protection only in the narrower circumstance where the disclosure is a violation of "law," omitting reference to rules and regulations. The clear implication is that the proviso

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[2] The adoption of the House version likely had more to do with the exemption for classified information than with the exemption for disclosures prohibited by law. The Senate version would have denied whistleblower protection for public disclosures prohibited by "Executive Order 11652, or any related amendments thereto." *1978 Senate Report* 154. Executive Order 11652, in turn, provided for classification of "information or material which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States." Executive Order 11652, § 1 (Mar. 8, 1972), 37 Fed. Reg. 5209 (Mar. 10, 1972). The House version did essentially the same thing, but referred generally to disclosures of information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." *1978 House Report* 146. The House's language was likely chosen because it would better accommodate new Executive Orders concerning classified information. Case in point: Executive Order 11652 had itself been revoked and replaced in June 1978, two months before the House and Senate passed their versions of the bill. See Executive Order 12065, § 6-203 (June 28, 1978), 43 Fed. Reg. 28,949 (July 3, 1978).

does not apply to disclosures forbidden by rule or regulation, but only to disclosures prohibited by "law." And if "law" excludes rules and regulations, it can only mean statutes.

"'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets omitted). Here, the legislative record confirms that that presumption is correct. The Senate affirmatively *deleted* a reference to rules and regulations, to avoid "enabl[ing] an agency to discourage an employee from coming forward with allegations of wrongdoing." *1978 Senate Report* 21. And the Conference Committee memorialized its understanding that "law" means statutes and "does not refer to agency rules and regulations." *1978 Conference Report* 130. The Department's interpretation ignores all that, and grants agencies precisely the power Congress sought to deny them.

2. *Whistleblower Protection Act of 1989*

The CSRA unfortunately "did little to encourage Federal employees' confidence in their ability to reveal problems in their agencies." 135 Cong. Rec. 4516 (1989) (Sen. Cohen). One of the chief "impediments," Congress concluded, was "a string of restrictive Merit Systems Protection Board and federal court decisions" that had made it "unduly difficult for whistleblowers * * * to win redress." *Id.* at 4512 (Joint Explanatory Statement). Congress thus enacted the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 ("WPA"), to "modify or overturn inappropriate administrative or judicial determinations and make it more likely that whistleblow-

ers * * * will win their cases," 135 Cong. Rec. 4512 (Joint Explanatory Statement).

a. The WPA did *not* revisit § 2302(b)(8)(A)'s "specifically prohibited by law" proviso. It had no need to. No judicial or administrative decision had read the proviso as referring to anything other than disclosures prohibited by *statute*. And Congress's understanding remained unchanged. The Conference Committee declared: "It is obvious, but worth noting, that no Executive order, *regulation*, or contract can extinguish the rights provided under section 2302 of title 5." 135 Cong. Rec. 4514 (Joint Explanatory Statement) (emphasis added). Committee reports for early versions of the bill reaffirmed that § 2302(b)(8)(A)'s proviso concerns "disclosure of information the public release of which is barred *by statute*." H.R. Rep. No. 99-859, at 16 (1986) (emphasis added); accord H.R. Rep. No. 100-274, at 17-18 (1987).

The WPA did amend § 2302(b)(8) in a small but meaningful way. Where the statute had previously protected "*a* disclosure" of agency misconduct, it now protected "*any* disclosure" of agency misconduct. WPA § 4(a)(3), (5), 103 Stat. 32 (5 U.S.C. § 2302(b)(8)(A), (B)) (emphasis added). By using the word "any," Congress emphasized that the statute's protections are meant to be "expansive." *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008).

b. More substantively, the WPA tilted the playing field sharply in favor of whistleblowers and against agencies. It provided that, when a whistleblower alleges retaliation before the Merit Systems Protection Board, the Board generally must order appropriate corrective action so long as a protected disclosure was a "contributing factor" in the challenged agency action. WPA § 3(a)(13), 103 Stat. 26, 30 (5 U.S.C. §§ 1214(b)(4)(B)(i), 1221(e)(1)). That

lenient standard was "specifically intended to overrule" cases demanding proof that the disclosure was a "'significant,' 'motivating,' 'substantial,' or 'predominant' factor." 135 Cong. Rec. 4509 (Sen. Levin). Agencies, by contrast, shoulder a far heavier burden: To avoid corrective action, an agency must show "by *clear and convincing evidence* that it would have taken the same personnel action in the absence of such disclosure." WPA §3(a)(13), 103 Stat. 26, 30 (5 U.S.C. §§1214(b)(4)(B)(ii), 1221(e)(2)) (emphasis added).[3]

Those asymmetric burdens are of a piece with §2302(b)(8)(A)'s asymmetric approach to defining protected disclosures. See pp. 11-13, *supra*. Both reflect Congress's deep-seated concern that agencies empowered to administer the whistleblower laws are apt to turn them into tools for exonerating, rather than exposing, agency misconduct.[4] It would have achieved little to make it so easy for whistleblowers to establish retaliation for protected disclosures—and so hard for agencies to justify their actions on other grounds—if Congress had

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[3] That standard was intended to increase the level of proof applicable under *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), which allows an employer to escape liability by showing "by a preponderance of the evidence" that it would have taken the same action "even in the absence of the protected conduct," *id.* at 287; see 135 Cong. Rec. 4513 (Joint Explanatory Statement).

[4] See *1978 Senate Report* 21 (expressing concern that exempting disclosures prohibited by rule or regulation would "enable an agency to discourage an employee from coming forward with allegations of wrongdoing"); 135 Cong. Rec. 4509 (Sen. Levin) (explaining that an "agency bears a heavy burden to justify its actions" because, "when it comes to proving the basis for an agency's decision, the agency controls most of the cards," such as documents and witnesses).

also given agencies the trump card of deciding what disclosures are protected in the first place.

c. The WPA continued to observe the distinction between "law" (meaning statutes) and "rules and regulations." Several provisions illustrate the point:

- One paragraph authorizes the Special Counsel to review "disclosures of violations of any *law, rule, or regulation*." WPA §3(a)(13), 103 Stat. 19 (5 U.S.C. §1212(a)(3)) (emphasis added).
- The next paragraph authorizes the Special Counsel to "review *rules and regulations* issued by the Director of the Office of Personnel Management." *Ibid.* (5 U.S.C. §1212(a)(4)) (emphasis added).
- The paragraph after that directs the Special Counsel to investigate "violations of other *laws* within the jurisdiction of the Office of Special Counsel (as referred to in section 1216)." *Id.* §3(a)(13), 103 Stat. 19-20 (5 U.S.C. §1212(a)(5)) (emphasis added).
- Section 1216, in turn, identifies various *statutory* provisions, such as the Hatch Act and Freedom of Information Act.[5]

Thus, in the WPA, as in the CSRA, Congress carefully distinguished between different kinds of legal authority. It understood that, in the whistleblower context, agencies

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[5] See 5 U.S.C. § 1216(a) (103 Stat. 28) (referring to "subchapter III of chapter 73," "chapter 15," and "section 552" of Title 5, United States Code). Section 1216's lone reference to non-statutory authority appears in a catch-all provision referring to "activities prohibited by any civil service *law, rule, or regulation*." *Id.* § 1216(a)(4) (emphasis added). Section 1216 itself thus demonstrates that the term "law" in the whistleblower statutes does not encompass rules and regulations.

make "rules" and "regulations," while Congress makes "law."

3. *The 1994 Amendments*

Congress amended the WPA in 1994, again taking aim at unduly restrictive interpretations of the law. See Pub. L. No. 103-424, 108 Stat. 4361 (1994) ("1994 Amendments"). The House Report criticized the Board's "inability to understand that 'any' means 'any,'" and that the "WPA protects 'any' disclosure evidencing a reasonable belief of specified misconduct." H.R. Rep. No. 103-769, at 18 (1994). It reiterated Congress's understanding that "[t]he only restrictions are for classified information or material the release of which is *specifically prohibited by statute*." *Ibid.* (emphasis added); see also S. Rep. No. 107-349, at 14-15 (2002) (quoting this statement). As before, however, Congress had no occasion to address the scope of § 2302(b)(8)(A); no court or administrative tribunal had read that provision differently from Congress. Indeed, the Board had adopted the same interpretation as Congress. See p. 20, *infra*.

But Congress did seek to "restore the balance intended in the Whistleblower Protection Act" by correcting other, erroneous interpretations of the law. S. Rep. No. 103-358, at 8 (1994). It overturned a Federal Circuit decision restricting whistleblowers' use of circumstantial evidence to prove retaliation. See *ibid.*; 1994 Amendments § 4(b), 108 Stat. 4363 (5 U.S.C. § 1221(e)(1)). Congress also rejected the Office of Special Counsel's view that it had unfettered "authority to 'utilize' information about whistleblowers during the course of an investigation in any way it pleases"—including by disclosing that information to the agency accused of retaliation. S. Rep. No. 103-358, at 6; see 1994 Amendments § 3(b), 108 Stat. 4362 (5 U.S.C. § 1212(g)(1)).

4. *Whistleblower Protection Enhancement Act of 2012*

Congress again amended the WPA in the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 ("WPEA"). As before, Congress was concerned that "the Federal Circuit and the [Board] have continued to undermine the WPA's intended meaning by imposing limitations on the kinds of disclosures by whistleblowers that are protected." S. Rep. No. 112-155, at 4-5 (2012) ("*2012 Senate Report*"). Congress reiterated its "long-held view that the WPA's plain language covers *any* disclosure." *Id.* at 4. And it reaffirmed that "'[t]he only restrictions are for classified information or material the release of which is *specifically prohibited by statute.*'" *Ibid.* (quoting H.R. Rep. No. 103-769, at 18) (emphasis added).

Again, there was no need to revisit §2302(b)(8)(A)'s proviso. As discussed below, see pp. 20-21, *infra*, in 2009 the Board interpreted the proviso to extend to disclosures prohibited by any regulation with the force of law. But the Board retreated from that position two years later, and in 2012 the matter was on appeal to the Federal Circuit. Amending the WPA to clarify that a disclosure must be prohibited by statute thus might have erroneously implied that the existing language did not already say that. At the same time, Members of Congress recognized that "[i]f the Federal Circuit Court [were to] broaden[ ] the 'prohibited by law' exemption to include anything that an agency tries to keep secret under any of their regulations," Congress would have to close that "new loophole." 158 Cong. Rec. E1664 (Sept. 28, 2012) (Rep. Platts). Representative Platts, a WPEA co-author, thus sought "to once again make it clear: 'Prohibited by law' has long been understood to mean statutory law and

court interpretations of those statutes, not * * * agency rules and regulations. * * * That has been the law since 1978, and it continues to be the law." *Ibid.*

In the WPEA, Congress had its hands full addressing decisions that had interpreted other aspects of the WPA "contrary to congressional intent." *2012 Senate Report* 5. It overturned Federal Circuit decisions denying protection to "disclosures to the alleged wrongdoer," "disclosure[s] made as part of an employee's normal job duties," and "disclosures of information already known." *Ibid.* (citing cases); see WPEA § 101(b)(2)(C), 126 Stat. 1466 (5 U.S.C. § 2302(f)). And it once again "underscore[d] the breadth of the WPA's protection by changing the term '*a* violation [of any law, rule, or regulation]' to the term '*any* violation [of any law, rule, or regulation]'" in § 2302(b)(8). *2012 Senate Report* 8 (emphasis added); see WPEA § 101(a), 126 Stat. 1465 (5 U.S.C. § 2302(b)(8)(A)(i), (B)(i)).

The WPEA also expressly granted TSA employees full whistleblower protections. WPEA § 109(a)(2), 126 Stat. 1470 (5 U.S.C. § 2304(a)(1)); contrast 5 U.S.C. § 2303 (affording lesser protection to FBI whistleblowers). In doing so, Congress again observed the distinction between "law" (meaning statutes) and "rules and regulations" that it embraced in 1978.[6]

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[6] Paragraphs (1) and (2) of 5 U.S.C. § 2304(a) state that TSA employees are covered by (1) "the provisions of section 2302(b)(1), (8), and (9)," and (2) "any provision of *law* implementing" those three statutory provisions. 5 U.S.C. § 2304(a)(1), (2) (emphasis added). Paragraph (3) then states that TSA employees are also covered by "any *rule or regulation* prescribed under any provision of *law referred to in paragraph (1) or (2)*." *Id.* § 2304(a)(3) (emphasis added). Paragraph (3) would be redundant if rules and regulations qualified as "law," for they would already be encompassed within paragraph (2).

B. Congress Has Relied on Administrative and Judicial Decisions Requiring That Disclosure Be Prohibited by Statute

As the above history makes clear, Congress has been extraordinarily attentive to judicial and administrative decisions interpreting the whistleblower protection laws. It has not been shy in amending those laws when it disagrees with how a tribunal has interpreted them. Indeed, the 1989, 1994, and 2012 amendments were all designed to overturn decisions that Congress believed misunderstood the proper scope of whistleblower protections.

Section 2302(b)(8)(A)'s "specifically prohibited by law" proviso, however, has not been misunderstood. While case law interpreting the proviso is relatively scarce (and most of it stems from this case), what decisions there are confirm Congress's understanding that disclosure must be prohibited by a statute, not a mere regulation.

The first decision construing the proviso appears to be *Kent* v. *General Services Administration*, 56 M.S.P.R. 536 (1993). There, the Board carefully examined "the statutory language, coupled with the legislative history of the CSRA, subsequently amended by the WPA." *Id.* at 542. It found "a clear legislative intent to limit the term 'specifically prohibited by law' in section 2302(b)(8) to *statutes and court interpretations of those statutes.*" *Ibid.* (emphasis added).

The Board adhered to that view for 16 years. It briefly reversed course in an earlier iteration of this case, reasoning that Congress's "selection of the broader phrase 'by law'" instead of the purportedly narrower phrase "by statute" "evidences Congressional intent to expand the scope of the exemption beyond mere statutes to include all 'law,'" including agency regulations. *MacLean* v. *Dep't of Homeland Sec.*, 112 M.S.P.R. 4, 16 (2009). But

that interpretation was short-lived. The Board repudiated it just two years later, recognizing that allowing agency regulations to dictate the scope of whistleblower protections in the absence of "an explicit Congressional mandate" would be "inconsistent with the policies that Congress embodied in the Whistleblower Protection Act." *MacLean* v. *Dep't of Homeland Sec.*, 116 M.S.P.R. 562, 570 (2011). In the decision below, the Federal Circuit agreed that a "disclosure must be prohibited by a statute rather than by a regulation" to fall within the proviso—indeed, that proposition was "not dispute[d]." 714 F.3d 1301, 1308 (Fed. Cir. 2013).

Thus, starting with *Kent* in 1993, the tribunals responsible for construing the whistleblower laws have interpreted § 2302(b)(8)(A)'s proviso to encompass only disclosures prohibited by statutes, not regulations. Since then, Congress has twice amended the WPA—in 1994 and 2012—with the express purpose of overturning those tribunals' interpretations of other parts of the statute. All the while, § 2302(b)(8)(A)'s "specifically prohibited by law" language has remain unchanged.

That is powerful evidence that Congress approves of the interpretation attached to those words. See *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2252 (2011) (inferring Congressional satisfaction with existing interpretation where relevant text "has gone untouched" despite other amendments). It is, after all, "well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) (quotation marks omitted). And this

Court has recognized that the presumption that Congress intends to adopt "an administrative or judicial interpretation of a statute" is "particularly appropriate" where "in enacting [later legislation] Congress exhibited both a detailed knowledge of the [existing] provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). That is exactly what Congress did here.

C. Section 114(r)(1) Does Not "Specifically Prohibit" Disclosure of the Information Here

For a disclosure to be "specifically prohibited by law," *Congress* must have barred the disclosure with *meaningful specificity*. That is not only what the text requires; it is also necessary to ensure fair notice and avoid deterring legitimate disclosures. A statutory prohibition is sufficiently specific only if it "leave[s] no discretion on the issue," "establishes particular criteria for withholding," or "refers to particular types of matters to be withheld." *1978 Senate Report* 21. Put simply, a prospective whistleblower must be able to tell from reading the statute whether or not he will be shielded from retaliation if he publicly discloses particular information.

The Department argues that 49 U.S.C. § 114(r)(1) specifically prohibited MacLean's disclosure here. Pet. Br. 28.[7] But that statute fails to provide the requisite specificity, at least on the facts of this case. "[D]isclosure[s] * * * detrimental to the security of transportation," 49 U.S.C. § 114(r)(1)(C), is a broad and general category.

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[7] Although the decisions below focused on § 40119(b), the parties agree that § 114(r) is the relevant statute. See Pet. Br. 10 n.2; Resp. Br. 7 n.2. We follow the parties' lead and focus on § 114(r), although the analysis would be the same under both.

Just from reading the statute, it is far from clear whether the particular information MacLean disclosed is included.

Indeed, such ambiguity may be unavoidable where a disclosure concerns a "specific danger to public health or safety." 5 U.S.C. §2302(b)(8)(A). A disclosure might be seen as "detrimental" because it reveals a vulnerability in our Nation's infrastructure that could be exploited. But the same disclosure could be seen as *beneficial* because it calls attention to the vulnerability and expedites its correction. That is why the WPA generally protects such disclosures. Cf. *1978 Senate Report* 8 ("What is needed is a means to protect * * * the nuclear engineer who questions the safety of certain nuclear plants."); 6 U.S.C. §133(c) (permitting whistleblower disclosure of independently obtained "critical infrastructure information").

Nothing in §114(r)(1) clearly indicates that Congress placed the information MacLean disclosed on the "detrimental" side of the line. And the fact that "the Under Secretary decides" which disclosures are prohibited, 49 U.S.C. §114(r)(1), underscores that the *statute* does not answer that question; the *agency* makes the call. That is precisely what §2302(b)(8)(A) declares insufficient to withdraw whistleblower protection.

II. Allowing Agencies To Create Exceptions To Whistleblower Protections Would Undermine Congress's Oversight Role

Allowing agencies to "specifically prohibit" disclosures under §2302(b)(8)(A) would compromise whistleblower protections and Congressional oversight. Agencies have barred disclosure of vast swaths of information by rules and regulations. Under the Department's interpretation, public disclosure of much (if not all) of that information would be "specifically prohibited by law." That would dramatically shrink the universe of information whistle-

blowers may expose to public scrutiny—a problem exacerbated by the haphazard approach many agencies take toward designating sensitive information. It would also chill *non*-prohibited disclosures, including disclosures to Congress. And it would open the door to agency overreach in suppressing inconvenient information, as decades of experience confirms.

A. Agency Rules and Regulations Create Dozens of Categories of Unclassified Information That Are Often Poorly Defined

This case concerns the TSA's Sensitive Security Information ("SSI") designation. But SSI is just one subset of a much broader group known as "Sensitive But Unclassified" information, or "SBU." SBU is "[i]nformation that does not meet the standards established by executive order for classified national security information but that an agency nonetheless considers sufficiently sensitive to warrant restricted dissemination." Gov't Accountability Office, *Information Sharing* 13 (Mar. 2006) (GAO-06-385) ("*Information Sharing*").

There are dozens of categories of SBU used across the federal bureaucracy. A 2006 survey found "a total of 56 different designations," *Information Sharing* 21; see *id.* at 22-23 tbl.2, while a 2009 report counted *117* categories, *Report and Recommendations of the Presidential Task Force on Controlled Unclassified Information* 33-34 (Aug. 2009) ("*Task Force*"). A single label, moreover, might refer to multiple kinds of information. For example, while 13 agencies use the designation "For Official Use Only," "there are at least five different definitions of FOUO." *Information Sharing* 24. Similarly, "[a]t least seven agencies or agency components use the term Law Enforcement Sensitive" but define it differently. *Ibid.*

The standards for designating information as SBU are often vague or arbitrarily applied. For example, the GAO found in 2005 (after MacLean's disclosure here) that the "TSA does not have written policies and procedures, beyond its SSI regulations, providing criteria for determining what constitutes SSI." Gov't Accountability Office, *Transportation Security Administration: Clear Policies and Oversight Needed for Designation of Sensitive Security Information* 3 (June 2005) (GAO-05-677). The TSA itself acknowledged that "'[i]dentification of SSI has often appeared to be ad-hoc, marked by confusion and disagreement depending on the viewpoint, experience, and training of the identifier.'" *Id.* at 5. And while the TSA urged in 2005 that "its new SSI Program Office will ultimately be responsible for ensuring that staff are consistently applying SSI designations," *id.* at 6, a 2014 investigation concluded that "the TSA Administrator repeatedly neglected to consult with the SSI Office when making SSI determinations," effectively "render[ing] the SSI Office powerless," House Comm. on Oversight & Gov't Reform, *Pseudo-Classification of Executive Branch Documents: Problems with the Transportation Security Administration's Use of the Sensitive Security Information (SSI) Designation* 22 (July 24, 2014) ("*Pseudo-Classification Report*").

The TSA is not alone in its ill-defined approach to SBU. "[M]ost agencies do not have limits on who and how many employees have authority to make designations." *Information Sharing* 6. And agencies that do have SBU policies may "lack sufficient clarity" in their policies or may "not routinely conduct oversight" to ensure that policies are properly applied. Gov't Accountability Office, *Managing Sensitive Information: DOE and DOD Could Improve Their Policies and Oversight* 3, 7

(Mar. 14, 2006) (GAO-06-531T). As one example, the Department of Energy restricted public access to time and cost estimates for a radioactive waste cleanup project plagued by delays and budget overruns. *Id.* at 7. The withheld document was "marked Business Sensitive by DOE"—even though "Business Sensitive is not a recognized marking in DOE." *Ibid.*

In short, the designation of SBU is governed by a mélange of "ad hoc, agency-specific policies." Executive Order 13556, § 1 (Nov. 4, 2010), 75 Fed. Reg. 68,675 (Nov. 9, 2010). As the President has recognized, "[t]his inefficient, confusing patchwork has resulted in inconsistent marking and safeguarding of documents, led to unclear or unnecessarily restrictive dissemination policies, and created impediments to authorized information sharing." *Ibid.*[8]

SBU stands in marked contrast to classified information, which Congress *did* exempt from the WPA. There are only three categories of classified information: Top Secret, Secret, and Confidential. Executive Order 13526, § 1.2 (Dec. 29, 2009), 75 Fed. Reg. 707 (Jan. 5, 2010). Information can be classified only according to specific criteria, *id.* § 1.4, only by certain officials, *id.* § 1.3, and only for a limited duration, *id.* § 1.5. And once material is classified, it must be marked so that its classification status—as well as its reason for classification—is "immediately apparent." *Id.* § 1.6. While those rules may

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[8] While there have been efforts to improve management of SBU, see Executive Order 13556; Nat'l Archives, *Controlled Unclassified Information (CUI): CUI Chronology*, http://www.archives.gov/cui/chronology.html, there are still "currently over 100 different ways of characterizing SBU information," Nat'l Archives, *Controlled Unclassified Information (CUI): Frequently Asked Questions*, http://www.archives.gov/cui/faqs.

leave some room for judgment, Congress determined that "the interest of national defense or the conduct of foreign affairs" outweighed such concerns. 5 U.S.C. §2302(b)(8)(A). But Congress made no such determination for SBU, where the risk of arbitrary application is much greater and the need for secrecy much less.

Allowing agencies' disparate SBU regimes to trump whistleblower protections thus would not only shrink the universe of information subject to public scrutiny, but would do so in a thoroughly unpredictable and arbitrary manner. That is not the system Congress designed.

B. Agency-Created Exceptions Would Deter Whistleblowing and Impair Congressional Oversight

The Department's interpretation would chill protected whistleblowing and block the flow of information to Congress.

1. Under the Department's interpretation, whistleblowers would have to review (or hire counsel to review) not only the relevant statutes, but also a plethora of potentially vague or ambiguous regulations. SBU is often poorly defined and inconsistently applied, and it may not be apparent whether an agency has declared something nondisclosable, much less done so through a regulation with the force and effect of "law." That determination may turn on a subtle legal analysis of whether a regulation "affect[s] individual rights and obligations"; whether its "promulgation * * * conform[s] with any procedural requirements imposed by Congress"; and whether some statute "can 'reasonably' be said to have 'contemplate[d]' the regulation." Pet. Br. 21 (quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302, 303, 308 (1979)). Most federal employees are not lawyers, and Congress did not expect them to have to undertake that analysis before blowing the whistle. Instead, Congress required them to answer

only the much simpler question of whether *a statute specifically prohibits* their anticipated disclosure.

Faced with the obstacles the Department's interpretation would introduce, some employees will doubtless conclude that blowing the whistle is not worth the trouble. As a result, many valuable and lawful disclosures will go unmade. The regime Congress designed, by contrast, avoids many of those difficulties. All statutes have the force and effect of law—they *are* law. And all information classified pursuant to Executive Order must be conspicuously labeled as such. See Executive Order 13526, §1.6.

2. The Department's interpretation would impair Congress's ability to gather information about agency misconduct. Many SBU designations do include exemptions for disclosures to Congress. See, *e.g.*, 49 U.S.C. §114(r)(2); see also 5 U.S.C. §2302(b) (WPA does not "authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress"). But agency employees may fail to appreciate carve-outs for Congressional disclosures when virtually every other kind of disclosure is forbidden. They may instead assume that a disclosure "specifically prohibited by [regulation]" is categorically out of bounds, even if made to Congress.

That is no idle worry. *Amici* routinely hear from federal employees who want to blow the whistle but are unwilling to share specific allegations out of fear of violating agency regulations—or giving superiors an excuse to claim that they violated such regulations. Potential whistleblowers also often fear that a protected disclosure to Congress may lead to subsequent *public* disclosures for which they could be blamed and punished. In other instances, whistleblowers are willing to share particular

concerns, but believe they cannot provide substantiating evidence because of SBU markings on documents. *Amici* see this phenomenon among whistleblowers who are nevertheless willing to put themselves at risk by making limited contact with Congress. Almost certainly, many more are deterred from making even that effort.

Even in official agency settings, "the markings [of information as SBU] are sometimes misunderstood as providing an independent basis for withholding documents from the public, Congress, or the courts." *Task Force* 6. That can occur even when an SBU designation has no basis in statute. *Ibid.* While a Congressional office may be able to overcome improper withholding by elevating a request within the agency, whistleblowers face obvious obstacles to doing so—especially if they seek to make disclosures confidentially to avoid retaliation. The risk of confusion about the scope of agency regulations thus underscores the importance of cabining § 2302(b)(8)(A)'s proviso to its proper—limited—scope.

3. As a practical matter, moreover, Congress commonly learns of agency misconduct indirectly, when employees blow the whistle to the media or other intermediaries first. Some whistleblowers may view Congress as too politicized or intimidating. But they may see the media as a disinterested Fourth Estate willing to take up a cause in the public interest, or as the quickest and surest way to impose accountability. Other whistleblowers may want to convey information to Congress but not see a clear route to the right offices or committees. In such cases, disclosure to the press is an effective way to disseminate information widely to Members of Congress and their staffs. It can also attract public attention and generate momentum for Congressional oversight in a

way that contacting Congressional offices privately might not.

This case illustrates the value of such disclosures. MacLean blew the whistle by contacting the media. When his story was published, Members of Congress from both parties condemned the TSA's directive the very next day. See Resp. Br. 11-12. And once Congress weighed in, the Department immediately branded the directive a "mistake" and rescinded it. *Ibid.*

Similar cases abound. For example, online postings spurred Congress's investigation into the Bureau of Alcohol, Tobacco, Firearms, and Explosives' controversial "gun-walking" operation. Within days of Border Patrol Agent Brian Terry being killed near the Arizona-Mexico border, a post appeared on an online message board frequented by ATF agents, stating that ATF had "[a]llegedly approved more than 500 AR-15 type rifles from Phoenix and Tucson cases to be 'walked' into Mexico" and that one of those rifles had been linked to Terry's death. See Joint Staff Report, House Comm. on Oversight and Gov't Reform & Senate Comm. on the Judiciary, *Fast and Furious: The Anatomy of a Failed Operation*, Part I, App. I, Ex. 201 (July 31, 2012), http://oversight.house.gov/wp-content/uploads/2012/07/7-31-12-FF-Part-I-FINAL-Appendix-I-3-of-3.pdf (Jan. 5, 2011 ATF e-mail quoting post). The post caught the attention of bloggers and other media outlets (as well as senior ATF officials, who discussed whether the post violated ATF disclosure policies, *ibid.*).

Shortly thereafter, another website posted an "Open Letter to Senate Judiciary Committee staff on 'Project Gunwalker.'" See D. Codrea, *Open Letter to Senate Judiciary Committee Staff on 'Project Gunwalker,'* Examiner.com (Jan. 19, 2011), http://www.examiner.com/article/

open-letter-to-senate-judiciary-committee-staff-on-project-gunwalker. The letter stated:

> ATF employees are looking to come forward and provide testimony and documentation about guns being illegally transported to Mexico, with management cognizance * * *. * * * In order for these people to come forward, they require whistleblower protection.

Ibid. That letter led directly to Congressional staff getting in contact with ATF whistleblowers, and subsequent Congressional oversight.

That roundabout path to contacting Congress is not unusual. Many whistleblowers make several disclosures before getting their information to someone able and willing to address the problem being disclosed. Congressional oversight thus benefits from disclosures to a variety of audiences, including the media and public interest groups. That is one reason the WPA is not limited to disclosures to Congress. Under the Department's interpretation of §2302(b)(8)(A), however, that conduit of information would dry up.

C. The Risk of Agency Overreach Is Apparent

Common sense counsels that allowing agencies to decide the protections available to employees who expose agency misconduct is "like putting the fox in charge of the henhouse." 160 Cong. Rec. S2367 (Apr. 10, 2014) (Sen. Grassley). Experience bears that out. Agencies have excelled at finding ways to suppress inconvenient information where the opportunity has arisen.

1. Congress enacted the Lloyd-LaFollette Act in 1912 to "guarantee[] that the right of civil servants 'to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or

interfered with.'" *Bush* v. *Lucas*, 462 U.S. 367, 383 (1983). In 1971, however, the Postal Service directed "that the Congressional Liaison Office be the sole voice of the Postal Service in communicating with the Congress" and ordered employees to "immediately cease [any] direct or indirect contacts with congressional officers on matters involving the Postal Service." Gov't Accountability Office, *Department of Health and Human Services—Chief Actuary's Communications with Congress* 5 (2004) (B-302911). The Postmaster General dismissed objections that the directive violated the Lloyd-LaFollette Act, urging that employees could petition Congress "about their own matters," but that he would "have to have control of" matters concerning the Postal Service. *Ibid.* Unsatisfied, Congress barred the use of appropriated funds to pay the salary of any postal official who prevented an employee from communicating with Congress. *Id.* at 4-6. As the legislation's sponsor observed, "the law that this amendment attempts to enforce has been on the books * * * since 1912." *Id.* at 6.

2. In the 1980s, the Department of Defense sought to silence whistleblower Ernie Fitzgerald by having him sign an agreement not to disclose "classifiable" (not classified) information without authorization. 160 Cong. Rec. S2366 (Apr. 10, 2014) (Sen. Grassley). The agreement would have barred even disclosures to Congress, hindering oversight over defense procurements (and likely violating the Lloyd-LaFollette Act). *Ibid.* Congress again responded swiftly. It enacted an "anti-gag" rider—now codified in the WPA—making agency non-disclosure agreements unenforceable unless they expressly state that they do not alter employees' rights relating to (among other things) "communications to Congress" and

"other whistleblower protection." 5 U.S.C. §2302(b)(13); see *2012 Senate Report* 16-17.

3. Agencies charged with defining whistleblower protections have failed to do so. In the CSRA, Congress protected FBI whistleblower disclosures made to the Attorney General or his designate, but not those made to the public. CSRA §101(a), 92 Stat. 1117 (5 U.S.C. §2303). Congress directed the Attorney General to "prescribe regulations" to ensure that reprisals do not occur, and directed the President to provide for enforcement mechanisms "consistent with" those available to other whistleblowers. *Ibid.* But nothing happened to implement those protections for nearly *20 years*.

The Justice Department was finally impelled to act by Frederic Whitehurst, who made repeated disclosures to Congress and the Inspector General regarding the FBI Crime Lab. In 1996, Whitehurst brought suit to require the Attorney General to develop the anti-retaliation regulations the CSRA required. But he was suspended in January 1997—without any regulations outlining how he could appeal that decision. See *Activities of the Federal Bureau of Investigation: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. (May 13, 1997) (statement of Dr. Frederic Whitehurst, through his attorney Stephen M. Kohn), http://fas.org/irp/congress/1997_hr/h970513w.htm; R. Suro & P. Thomas, *FBI Suspends Internal Critic of Its Crime Lab Procedures*, Wash. Post, Jan. 28, 1997, at A11, http://www.washingtonpost.com/wp-srv/national/longterm/oklahoma/stories/ok012897.htm. Not until the Inspector General issued a report substantiating Whitehurst's allegations—resulting in significant public pressure on the FBI and Justice Department—did the Executive Branch take steps to prescribe the regulations mandated 20 years ear-

lier. See U.S. Dep't of Justice, Office of Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (Apr. 1997), http://www.justice.gov/oig/special/9704a; Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978, 62 Fed. Reg. 23,123 (Apr. 17, 1997).[9]

4. One of the most sobering examples of agency overreach is the TSA's experience with its SSI regime. A 2014 House Oversight and Government Reform Committee investigation found "significant problems with TSA's application of the SSI designation," with TSA officials "sometimes choosing to release information the SSI Office determined to be sensitive security information while in other instances refusing to release potentially embarrassing information the SSI Office did not consider to merit the SSI designation." *Pseudo-Classification Report* 12. SSI, the investigation concluded, was labeled in a "seemingly arbitrary manner," making it "easy for Administrators to play politics with sensitive information." *Id.* at 22.

The former director of the TSA's SSI Office, Andrew Colsky, described "*extreme pressure*" to mark as SSI information that "was either embarrassing or was something that they just didn't want the other side to know." *Pseudo-Classification Report* 12. Conversely, there was surprising willingness to release information about the presence of air marshals on flights: "[W]henever there were any events that were newsworthy and dealt with an

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[9] In October 2012, President Obama ordered the Attorney General to submit, within 180 days, a report assessing the existing FBI whistleblower regulations and proposing any necessary revisions. Presidential Policy Directive 19, § E, at 5 (Oct. 10, 2012). The report was finally delivered June 2, 2014.

airline, Public Affairs would be in touch with the news media and couldn't wait to tell them * * * there were air marshals aboard * * * or this is a regular route that air marshals fly or air marshals * * * never travel alone." *Id.* at 17. Eventually, Colsky refused to sign "court documents confirming SSI decisions" because he did not "know what to honestly call SSI anymore." *Id.* at 18.

The investigation did find some recent improvements. *Pseudo-Classification Report* 28-29. But what's past is prologue. History is liable to repeat itself at agencies that have not been subject to the same scrutiny. The TSA's troubling experience aptly illustrates why Congress chose not to condition whistleblower protections on agency discretion.

* * *

The WPA's basic premise is that agencies do not always act responsibly. Congress needs whistleblowers to expose misconduct and keep agencies in check. Whistleblowers, in turn, need protection from agencies displeased with having their shortcomings exposed. The Department's interpretation would turn that regime upside down. It would grant agencies unprecedented power to decide when employees may expose misconduct—power that is prone to abuse. Nothing in the WPA's text, structure, history, or purpose suggests that Congress intended to facilitate such agency overreach. To the contrary, Congress sought to *restrain* agencies. The Department's interpretation would defy that mandate.

CONCLUSION

The Federal Circuit's judgment should be affirmed.

Respectfully submitted.

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September 2014

AMICUS CURIAE BRIEF

FILED
SEP 10 2014
OFFICE OF THE CLERK

No. 13-894

In The

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY,

Petitioner,

vs.

ROBERT J. MACLEAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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QUESTIONS PRESENTED

Was the Federal Circuit correct that respondent's disclosure of Sensitive Security Information (SSI) concerning Federal Air Marshals was not specifically prohibited by law within the meaning of 5 U.S.C. Section 2302(b)(8)(A) or regulation?

Was the Federal Circuit correct that 5 U.S.C. Section 2302(b)(8)(A) immunized the respondent from disciplinary action for disclosing SSI to Senator Hillary Clinton and the press?

Does the Executive Branch violate 5th Amendment due process guarantees under the U.S. Constitution by retroactively imposing a Sensitive Security Information (SSI) classification to contrive an alleged "misconduct" basis to terminate the employment of a non-probationary federal employee for the "efficiency of the service" within the meaning of Title V of the United States Code?

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THE INTEREST OF THE *AMICUS*[1]

In his request for certiorari, the Obama Administration's Solicitor General labeled as "dangerous" the unanimous decision by the three-judge panel of the Court of Appeals for the Federal Circuit in favor of patriot whistleblower Robert J. MacLean. As the submitter of the prevailing *amicus* brief in this Court below, I have a personal interest in the outcome of the case herein. I do not also want to be adversely stigmatized as "dangerous" to offset my legal achievements.

What is dangerous is the decline in the rule of law that Mr. MacLean and our nation have suffered.

I am a former White House Attorney. In 1981, I preceded by one year Chief Justice John Roberts's representation of the Office of Counsel to the President.

I was admitted to the U.S. Supreme Court bar in 2002. My law school's fellow graduates and I were kindly welcomed personally by Justice Ruth Bader Ginsburg. This followed the larger ceremony of several groups on motion in the building dedicated to Equal Justice for All.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

I am the author of the Ethics Section of the D.C. Practice Manual. I am the co-author of the 1982 University of Saskatchewan published article, "The Right of American Sovereignty over Wrangell Island." Our legal analysis was entered into the Congressional Record as Extended Remarks and motivated Cabinet and Senate debate over the then-pending Maritime Boundary Treaty with the Soviet Union.

My 2013 co-authored book, Quest for Freedom, is published by Amazon Books. It traces the etiology of the U.S. Constitution and its First Amendment in particular. America's constitutional government followed the sacrifice of 40,000 patriots who gave their last full measure of devotion in support of the rule of law in their new nation.

My Hessian soldier ancestor, Heinrich Stisser, abandoned the oppressive "Kingly Rights" army of George III. Henry Stisser earned a military pension for his courageous service to his new country in a German speaking unit of revolutionary soldiers.

Over twelve thousand of the thirty thousand Hessian mercenaries who invaded Long Island in 1776 to drive George Washington's troops out of New York City remained in America after the Revolutionary War. Our book also recalls that seventy Presbyterian Churches in the colonies were burned down by Red Coats in reprisal for their parishioner's nearly unanimous quest for freedom against the English Crown.

SUMMARY OF THE ARGUMENT

By 9-11-2001, Respondent Robert J. MacLean had earned a property interest in his non-probationary federal employment as an Air Marshal. Today's Petitioner, the Department of Homeland Security, violated this air marshal leader's 5th Amendment guarantees of due process by retroactively classifying his protective disclosure regarding the reduction of Air Marshals in commercial airliner service as "Sensitive Security Information (SSI)" as a pretext for "misconduct" to terminate his employment in violation of Title V of the United States Code. The Court of Appeals for the Federal Circuit correctly applied 5 U.S.C. Section 2302(b)(8)(A) to determine that: (1) MacLean's protected disclosure was not specifically prohibited by law and, (2) MacLean's disclosure to Senator Hillary Clinton and the press was immunized from disciplinary action. In an admission against interest, the TSA Director of the Office of Sensitive Security Information (SSI), Andrew Colsky, expressed doubt over his SSI classification regarding Mr. MacLean.

STATEMENT OF THE ARGUMENT

The Justice Department's argument is not persuasive that the decision of the U.S. Court of Appeals for the Federal Circuit is incorrectly reasoned, let alone "dangerous." Moreover, the Department of Justice has failed to address the stated uncertainty of TSA Director, Office of Sensitive Security Information,

Andrew Colsky, concerning his application of SSI regarding Mr. MacLean.

I ask the U.S. Supreme Court to take judicial notice of the decline in the rule of law in today's America that includes the following troubling absurdities and the abuse of Executive Branch power.

Robert J. MacLean, a targeted air marshal leader, lost his property interest in his non-probationary Executive Branch job created under Article II of the U.S. Constitution for alleged misconduct regarding a National Air Marshal disclosure which was not Sensitive Security Information (SSI) at the time of the disclosure to Senator Hilary Clinton and the press. *Ex post facto* application of statute or regulation by the federal government flaunts 5th Amendment guarantees of due process under the United States Constitution.

At least four U.S. citizens, including a sixteen-year-old boy, have been assassinated recently in Yemen by U.S. Military drones without any due process of law under the U.S. Constitution. These murders violate traditional notions of fair play and substantial justice. They were innocent until proven guilty.

President Lyndon Baines Johnson allegedly ordered the sinking of the U.S.S. Liberty off the coast of Israel to make Egypt the fall guy so as to justify a Middle East War. Were the innocent lives of U.S. sailors actually expendable? Was the Gulf of Token Resolution a contrivance to send 67,000 Americans to death in Indo-China for the ego of LBJ?

The U.S. Senate has been recently spied upon by the Executive Branch's Central Intelligence Agency (CIA). As a college student, Barack Hussein Obama allegedly traveled to Pakistan on an Indonesian passport that may have furthered CIA interests as well as his long and short term goals.

Forty-seven U.S. inspectors general have denounced recently the failure of the Executive Branch under Article II of the U.S. Constitution to provide each of them with all the information necessary to carry out their statutory duties. This alleged repression violates the Inspectors General Act of 1978 passed by Congress and signed into law by President Jimmy Carter.

Executive Branch reprisal against whistleblowers is now pandemic. Former Congressional candidate and investigative reporter Fred Sanders concluded that a solid fuel missile shot down TWA Flight 800 off the Connecticut coast. The U.S. Justice Department prosecuted him for testing shoreline debris on the pretext that he had "disturbed" a crash site that was otherwise untested and silent as to the truth of scores of observers who witnessed converging vapor trails and the sound of exploding ordinance.

Fortunately, the quest for the air disaster's true causation was recently re-opened by federal aviation authorities. The death of all passengers and crew may be an anti-aircraft missile from a submarine that missed its drone target, not an unruptured fuel tank without the necessary heat or oxygen for an

explosion. On a daily basis, 30,000 commercial flights operate safely with no ruptured fuel tanks.

The very nature of MacLean's protected disclosure also contradicts logical expectations. Why was Federal Air Marshal assistance reduced and not increased on 9-11-2001 immediately after four airliner skyjackings and the deaths of over 3,000 Americans? President George W. Bush's pretext of "weapons of mass destruction" is as derided as ever today for the initiation of a second Iraq War whose adverse ramifications continue today.

On September 11, 2001, Janet Howard was on Capitol Hill for No Fear Act activities. She and others observed a very low flying commercial airliner that buzzed the U.S. Supreme Court Building as it headed towards the Pentagon. After her reporting the incident, Janet was fired from federal employment.

At the National Press Club in Washington, D.C., spokesmen for two thousand architects and structural engineers concluded that synchronized nitric oxide detonations on 9-11, not an air born terrorist attack, demolished Building Seven of the World Trade Center. Two weeks prior to 9-11, the insurance coverage for Building Seven was allegedly increased. The growing number of truthers in the thousands is too large to orchestrate reprisal IRS audits for all.

CONCLUSION

The "non-dangerous" decision of the Federal Circuit in the case herein must be sustained to protect the rule of law in America.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 29 2014
OFFICE OF THE CLERK

No. 13-894

In The

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY,
Petitioner,

v.

ROBERT J. MACLEAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Federal Circuit

BRIEF OF AMICUS CURIAE
Project On Government Oversight
In Support of Affirmance

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IDENTITY AND INTEREST OF THE AMICUS

The Project On Government Oversight (POGO), founded in 1981, is a nonpartisan independent watchdog organization that champions good government reforms. POGO's investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. Working with whistleblowers and Congressional oversight Committees for such purposes is an integral part of POGO's mission, and ensuring strong whistleblower protections is therefore one of its core policy priorities. Since its inception, POGO has been in the forefront of efforts to strengthen whistleblower protection laws, most recently working to pass the Whistleblower Protection Enhancement Act ("WPEA"). POGO frequently testifies before Congress in support of open government legislation, lobbies for the strongest possible provisions, urges the public to take action, and organizes critical support.[1] POGO is also working with the National Archive and Records Administration to curtail the proliferation of "controlled unclassified information", also known as "sensitive but unclassified", designations and create a uniform system for using such markings.

Upholding Congress' intent underlying the Whistleblower Protection Act (WPA) is of great concern to POGO as a primary method of informing Members of Congress and the public about waste, fraud, and misconduct within government agencies that would otherwise go undetected. The Whistleblower Protection Act was created to

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[1] Pursuant to Rule 37.6, undersigned Counsel certifies that neither Counsel for the parties authored, in whole or in part, or contributed monetarily to the preparation of this Brief. This Brief was paid for by the amicus.

protect the public interest, and serves as a critical bulwark against abuses of authority and excessive secrecy in the interest of bureaucratic self-preservation. It should not be eviscerated.

SUMMARY OF ARGUMENT

In addition to the arguments made and authorities cited in the Respondent's Brief on the Merits, support for affirming the Federal Circuit Court's decision can be found in Executive Order 13566 (E.O. 13556), and in the public policy imperatives recognized by Congress when it enacted and repeatedly strengthened protections for federal employees under the Whistleblower Protection Act (WPA). Despite ample authority and opportunity, neither the President, as Commander in Chief, nor Congress has seen the need to include sensitive but unclassified information in the category of information subject to a complete ban on disclosure. The WPA drew a bright line between information protected by law and that covered by agency rule or regulation. A critical component of this distinction has historically been that of providing clear notice to federal employees what information they encounter on the job is prohibited from public disclosure in all instances, and which information is not. Without such certainty and notice, no regime for protecting information can be functional, much less serve as a basis for an exemption by law from the protection afforded by the Whistleblower Protection Act.

In addition, the public policy underlying the Whistleblower Protection Act is reflected in the First Amendment and the federal oath of office taken by every federal employee. These principles are reflected in the

"freedom to warn" and in the repeated action by Congress to strengthen statutory protection in the WPA.

ARGUMENT

A. Executive Order 13556 – Controlled Unclassified Information Provides Additional Support for Affirming the Federal Circuit's Finding that Sensitive Security Information is Not Prohibited from Disclosure Under the Whistleblower Protection Act

Executive Order (E.O.) 13556 was issued on November 4, 2010. Its stated purpose was to "establish[es] an open and uniform program for managing information that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Government-wide policies, excluding information that is classified under Executive Order 13526 of December 29, 2009, or the Atomic Energy Act, as amended," the type of information previously designated "Sensitive Security Information" (SSI) by the Transportation Security Administration.[2] E.O. 13556, Nov. 4, 2010, Section 1. Purpose. The President issued this E.O. in response to the apparent lack of specificity, openness, and consistency across government agencies in how unclassified but sensitive information is to be identified and protected, and in some cases, disclosed. *Id.,* Section 1. The E.O. specifically noted that, "This…confusing patchwork has resulted in inconsistent marking and safeguarding of documents, led to unclear or unnecessarily restrictive

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[2] This E.O called for renaming all controlled unclassified information "CUI." For clarity, this Brief will refer to such information, including the information disclosed by federal air marshal MacLean in 2003, and later retroactively designated "SSI," as "CUI/SSI."

dissemination policies and created impediments to authorized information sharing." *Id.*

This Order is relevant to the question presented in two distinct ways. First, on its face, the E.O. states that it "shall serve as the exclusive designation for identifying unclassified information…pursuant to and consistent with applicable law, regulations and government wide policies." *Id.*, Section 2(a). As argued in Respondent's brief, Congress enumerated two exceptions to the protections provided by the Whistleblower Protection Act (WPA), one for disclosures "specifically prohibited by law," the other for disclosing information specifically required by executive order to be kept secret in the interest of national security or the conduct of foreign affairs." Respondent's brief at 20, (quoting 5 U.S.C. § 2302(b)(8)(A)). The E.O. is entirely consistent with Respondent's arguments that WPA protections cannot be denied unless the disclosure falls squarely within these two exceptions. Section 2(b) of the E.O. specifically states that "The mere fact that information is designated CUI shall not have any bearing on determinations pursuant to any law requiring the disclosure of information, or permitting disclosure as a matter of discretion…." This sentence reflects the intent of the Order that designating information CUI/SSI has no legal effect under disclosure statues, or the ability of an agency to voluntarily disclose that information.

The U.S. National Archives and Records Administration, the agency charged with implementing and ensuring compliance with the E.O., makes clear on its public website that designation as CUI/SSI has no effect on whether information is subject to disclosure under the Freedom of Information Act (FOIA). (see http://www.archives.gov/cui/faqs.html). Petitioner's

contention that designation as CUI/SSI has the effect of a prohibition by law that eliminates protection for disclosing that information under the WPA is in direct conflict with the stated effect of designation in the President's Order. If the Petitioner's reasoning is adopted, it raises the bizarre prospect that an employee would be subject to termination for disclosing the same information that the Agency could be required to release in response to a FOIA request.

This understanding, that a designation of information as CUI/SSI is *not* based on statutory authority, but is to be implemented "consistent with" applicable law rather than to create an exception to, or exclusion from, disclosure statutes, is reflected in the Presidential Memoranda which preceded the Order dating back to before air marshal MacLean was terminated in 2006. (*See* "Memorandum for the Heads of Executive Departments and Agencies, Subject: Classified Information and Controlled Unclassified Information" issued May, 27, 2009, describing the procedural history of implementing the system for protecting "sensitive but unclassified" information under various labels, dating back to December, 2005.) Petitioners ask this Court to ignore this long held, publicly stated understanding by the Commander in Chief, and give CUI/SSI designation the effect of law in one context, when the Commander himself has explicitly stated that it shall not have that effect in other closely related statutes.

Second, the Executive Order and Presidential directives related to the CUI/SSI designation is analogous to the statutory construction and legislative history arguments made throughout Respondent's Brief. The fact that this E.O., and all of the memoranda leading up to its issuance addressing CUI/SSI designation fail to affirmatively state that

CUI/SSI information is prohibited from disclosure by law or Executive Order begs the question: Why?

Following the same logic applied to legislative action by Congress, the Executive is presumed to know the extent and limits of his authority, and how to use it. As explained in the Respondent's Brief, an Executive Order is one of two methods Congress created to exempt disclosures of information from protection under the WPA. *See* 5 U.S.C. § 2302(b)(A). If the President, who as Commander in Chief has the Authority to do so, does not designate CUI/SSI as protected by Executive Order, it can be assumed that he did not intend to. The President easily could have included language that would have prohibited CUI/SSI from disclosure under the WPA in E.O. 13556, or any other Order, dating back to the creation of this designation in the aftermath of the September 11, 2001 attacks. No President has seen fit to do so.

In fact, if the Commander in Chief felt disclosing CUI/SSI information needed to be exempted from protection under the Whistleblower Protection Act, he has an even more appropriate E.O. with which to do it. E.O. 13526, "Classified National Security Information," issued on December 29, 2009, revises and replaces previous Orders dealing with national security information. If the Commander in Chief felt CUI/SSI information deserved an absolute bar against disclosure, he surely could have included it in E.O. 13526. But again, he did not. This indicates that the Department of Homeland Security and the Commanders in Chief actually disagree on the need to exempt CUI/SSI information from disclosure in the context of 5 U.S.C. § 2302(b)(8), the WPA. This Court should not, at the patently self-serving request of the Petitioner, circumvent the will of Congress and the two

Commanders in Chief who have served since this category of information was created to eviscerate the boundaries for disclosures protected under the WPA.

B. Even if CUI/SSI Regulations Barring Disclosure are Deemed to be Prohibitions "by Law" Under the WPA, They Lack the Specificity Required Under that Statute

If, as the Petitioner urges, this Court accepts the argument that the regulations promulgated by the Aviation Transportation Security Act qualify as "prohibitions by law," those regulations are so vague and confusing that they fail the statutory requirement that they be "specific." The Respondent eloquently argues this point in part "B" of the Argument section of its Brief. There is ample argument supporting this contention.

In *MacLean v. DHS,* 543 F.3d 1145 (9th Cir. 2008), the court held that the text message received by air marshal MacLean canceling all overnight flights qualified as SSI dispute the lack of markings. While the holding did not concern Mr. MacLean's employment rights, the court's qualifier was an indirect finding that the message lacked the specificity necessary to cancel WPA public free speech rights. The Court instructed:

> "MacLean may still contest his termination before the MSPB, where he may raise the Whistleblower Protection Act and contend that the lack of clarity of the TSA's 2003 'sensitive security information' regulations is evidence MacLean disseminated the text message under a good faith belief the

> information did not qualify as 'sensitive security information.'" *Id.*, at 1152.

The court would not have made that reference, if the boundaries for restricted speech were sufficiently specific and provided clear notice.

The Ninth Circuit's qualifier was necessary because it had ruled that SSI did not require markings.[3] For far more dangerous classified information, it is mandatory under the Intelligence Identities Protection Act to have specific markings, so an employee has clear notice of its restricted status. Since 1988, "unmarked but classified" information has been insufficient to cancel WPA public free speech rights. Under the appropriations "anti-gag statute" just codified in the Whistleblower Protection Enhancement Act, Pub. L. No. 101-12, 103 Stat., 16, it is illegal even to spend money trying to seek sanctions against a whistleblower for disclosing "unmarked but classified" material. (See "Anti-Gag statute," Pub.L. No. 109-115, § 820, 119 Stat. 2396, 2500-2501 (2005)). There is no national security basis, and it would be irrational if employees could be fired for disclosing unmarked SSI.

The source of clarity for ATSA transparency limits is its statutory language specifically overriding the FOIA. 49 U.S.C. § 114r. The statute does not contain any similar restriction for WPA disclosures, although the two are sister statutes. Clearly, Congress specifically chose not to limit the WPA through the aviation law. DHS argues that the overview

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[3] Although not at issue in this appeal, the Amicus disagrees with this holding. If employees are required to guess whether unmarked information is restricted, they will hesitate to make disclosures, especially where the liability for error could be the loss of livelihood.

language in section 114r has broad applicability. That is not the point, and begs the question of specificity. To prove specificity, DHS's argument depends on adding a new item, the WPA, to the restrictions listed in section 114r. The same statutory construction principles cited throughout the Respondent's Brief disqualify even this Court from adding a new item to a statute in this manner.

C. Government Employees Have The Freedom To Warn When The Employee Reasonably Believes There Is A Substantial And Specific Danger To Public Safety

MacLean exercised the freedom to warn to protect public safety and our homeland. His actions prevented the government from canceling all Federal Air Marshal (FAM) coverage, yet he was terminated three years later for making a disclosure to warn Congress and the public about the possible consequences of removing FAM protection on long distance flights—a decision based on saving money on overnight hotel stays, overtime, and travel allowances.

The Court held in *Lane v. Franks*, 134 S.Ct. 2369, 2380 (2014) that speech is entitled to First Amendment protections "if an employee speaks as a citizen on a matter of public concern" and that public concern outweighs the government's ""justification for treating the employee differently from any other member of the public' based on the government's needs as an employer." Citations omitted. The Court further "recognized that government employers often have legitimate 'interest[s] in the effective and efficient fulfillment of [their] responsibilities to the public,' including "'promot[ing] efficiency and integrity in the discharge of official duties,'" and "'maintain[ing] proper discipline in public service.'" *Id.*, at 2381. The Court also

cautioned, however, that "a stronger showing [of government interests] may be necessary if the employee's speech more substantially involve[s] matters of public concern." *Id.* Citations omitted.

As noted, this principle—that federal employees should be protected against reprisal for lawful disclosure of information which the employee reasonably believes evidences a substantial and specific danger to public health or safety—is the primary rationale for the statutory protection afforded in the WPA. 5 U.S.C. § 2302(b)(8)(A). Additionally, the oath of office codified at 5 U.S.C. § 3331 requires that public servants "support and defend the Constitution of the United States against all enemies ... and that [they] will well and faithfully discharge the duties of the office on which I am about to enter."

Those laws provide essential protections to government employees who are retaliated against for reporting flaws in national or homeland security, public health and safety, or waste, fraud and mismanagement of public funds. The government should protect those in government who honor their duties to serve and warn the public.

Unlike strict security for the terrorist briefings, MacLean received a text message without any warnings, restrictions, or markings that it contained classified or SSI. air marshal MacLean was deeply troubled about the consequences of abandoning defenses against terrorists during an emergency alert, and he was unwilling to give up so easily. He felt it was necessary to report his concerns to his superiors and the Inspector General. Only after being told that "nothing could be done" and to "just walk away", air

marshal Maclean decided to go public. Respondent's Brief at 11. Enough time had passed since air marshal MacLean had raised the issue internally and the threat of an attack was looming ever larger, so he decided to warn Congress by contacting a reporter known to cover air transportation safety issues on Capitol Hill in an effort to keep the flight cancelation plan from taking effect. The information he had been given by his supervisors was more than sufficient to form a reasonable belief that canceling FAM coverage during an anticipated terrorist hijacking was dangerous and jeopardized public health and safety.

The government's subsequent admission that terminating the program was a "mistake" adds validation to air marshal MacLean's actions. Respondent's Brief at 12. He did not force anything directly; it was the power of the truth. Air marshal MacLean disclosed that the government would be off duty during the terrorist attack. He made a difference, because the facts exposed an indefensible government action. He was exercising the freedom to warn of a substantial and specific danger to public health and safety, and threat to the national security of the United States.

The Court should find that air marshal Maclean acted in good faith and hold that public servants have a right to make a difference, without reprisal, through the First Amendment protection of speech and freedom to warn in cases involving imminent threats to public health and safety.

CONCLUSION

For the reasons stated above, as well as the arguments made and authorities cited throughout Respondent's Brief,

the Court should reject this attempt by Petitioner, the Department of Homeland Security to circumvent Congress and the President's established will, and affirm the Court of Appeals' judgment. Not to do so would eviscerate the WPA protections for conscientious federal employees who, at great peril to their own interests, speak out against waste, fraud, violations of law, rule or regulation, or as here, a substantial and specific threat to public health and safety.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

No. 13-894

In The Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY,
Petitioner,

v.

ROBERT J. MACLEAN,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Congress has directed that the Transportation Security Administration "shall prescribe regulations prohibiting" the "disclosure of information obtained or developed" in carrying out certain transportation-security functions, if the agency "decides" that "disclosing the information would * * * be detrimental" to transportation security. Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101(e), 115 Stat. 603; Homeland Security Act of 2002, Pub. L No. 107-296, Tit. XVI, § 1601(b), 116 Stat. 2312. Such information is referred to in the regulations as "Sensitive Security Information." *See, e.g.*, 67 Fed. Reg. 8351 (Feb. 22, 2002).

The question presented is whether certain statutory protections codified at 5 U.S.C. § 2302(b)(8)(A), which are inapplicable when an employee makes a disclosure "specifically prohibited by law," can bar an agency from taking an enforcement action against an employee who intentionally discloses Sensitive Security Information.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues.

Amicus is interested in the instant case because of the potential impact it will have on the protections provided to whistleblowers nationwide. By disclosing instances of waste, fraud, and abuse to the public, whistleblowers act as an important check on government officials, keeping them accountable to the voting public. In exposing government abuse, whistleblowers often risk their own personal and professional security in order to serve the greater public good. *Amicus* is interested in this case in order to ensure that the protections afforded to whistleblowers under the Whistleblower Protection

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[1] Pursuant to Sup. Ct. R. 37.3(a), counsel of record for the parties have filed with the Court letters granting blanket consent to the filing of *amicus curiae* briefs on behalf of either party or neither party. Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* and their counsel have contributed monetarily to its preparation or submission.

Act ("WPA") continue to adequately protect them from retaliation for making protected disclosures.

SUMMARY OF THE ARGUMENT

To confirm the need for strong protections for whistleblowers, one need not look further than the facts of this case. Robert MacLean witnessed activity at his agency that endangered public safety, and he disclosed that information to individuals that he knew were capable of shedding light on the matter. The outcry was immediate and decisive, the problem was remedied, and the flying public was made safer by MacLean's action.

The agency, however, was publicly embarrassed by the disclosure, and predictably sought its revenge by the means most accessible to executive agencies: through the use of its rulemaking powers. It designated the information MacLean had disclosed as "Sensitive Security Information," over two years after the fact, through a process that has little to no external oversight, and used the disclosure as a pretext to have MacLean removed.

Whistleblowing, by its very nature, results in embarrassment for an agency. It alerts the public to the wrongs that an agency had, until then, been successful at concealing, and it makes the source of a disclosure an immediate target for retaliation. Knowing this, Congress drafted the WPA and the

later 2012 amendment broadly, excepting only very specific categories of information as unprotected. DHS's reading of the disclosure exceptions would eviscerate the meaning and intention of the WPA, and would once again tip the balance toward agencies, allowing them to exploit their rulemaking powers to target legitimate whistleblowers.

Therefore, given the very weak protections that the WPA currently affords whistleblowers, it could not have been Congress's intention to completely eviscerate the Act's protections by allowing agencies to effectively regulate their way out of any accountability through the use of internal agency rules. Further, DHS's preferred expansive reading of WPA's exception provision is wholly unnecessary given the government's extensive use of the classification system to protect its most sensitive information from unlawful disclosure.

ARGUMENT

I. GRANTING DHS'S INTERPRETATION OF THE WHISTLEBLOWER PROTECTION ACT'S (WPA) "SPECIFICALLY PROHIBITED BY LAW" EXCEPTION TO INCLUDE AGENCY REGULATIONS WOULD UNDERMINE CONGRESS'S STATED PURPOSE IN ENACTING THE WPA

Despite DHS's attempts to characterize the Federal Circuit's decision as dangerous and

unprecedented, the instant case only addresses a threshold question, but one which will profoundly affect the rights of government whistleblowers in all agencies of the federal government. Given DHS's alarmism, it is worth highlighting what is *not* at issue in the instant case. What is not at issue at this stage of the litigation is the ultimate resolution of Robert MacLean's employment status with the agency. As Respondent aptly noted, even with MacLean's success on appeal, the Federal Circuit did not reverse the ALJ's findings in favor of his removal, and did not find in favor of his WPA affirmative defense claim. Resp. Br. in Opposition at 14.

Indeed, in its decision, the Federal Circuit did not even determine that the WPA applies in MacLean's case at all, or in any other similar such case where SSI is disclosed. Resp't. Br. in Opp'n at 30; *MacLean v. Department of Homeland Sec.*, 714 F.3d 1301, 1309 (Fed. Cir. 2013). The only determinations that the Federal Circuit made in reaching its decision were: 1) that the WPA means exactly what it says, and that only disclosures "specifically prohibited by law" are exempted from its coverage, and 2) that by extension, SSI disclosures are not *categorically* exempt from WPA coverage. *Id.*

For its own part, DHS significantly understates the certain effect of a contrary ruling, and the reason it does so is immediately evident when considering the facts of the instant case. Without the affirmative defense provisions of the WPA to protect potential whistleblowers, agencies embarrassed by the disclosure of unfavorable and embarrassing information would do exactly what the

DHS did in MacLean's case: they would invoke one of the many internal regulatory rulemaking powers at their disposal as a means to intimidate potential whistleblowers into silence, preventing them from speaking out for fear of removal or other retaliation, thereby undermining the core purpose of the WPA.

When Congress enacted the WPA in 1989, it did so through the adoption of unmistakably strong language. The Act's terms are unequivocal: the WPA protects an employee against retaliation for disclosures he or she makes of a "violation of any law, rule, or regulation," excepting only a disclosure "specifically prohibited by law" or "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. § 2302(b)(8).

In the 25 years since its passage, courts chipped away at the WPA's strong protections through increasingly narrow interpretations of the Act, and through a general "judicial reluctance to apply an expansive definition of protected disclosures" that Congress intended. S. Rep. No. 108–392, at 4 (2004). In response, Congress revised the WPA in 2012 through the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465, in order to "overturn[] several court decisions that narrowed the scope of protected disclosures." S. Rep. No. 112-155, at 3-5 (2012).

A. In Its Current Form, The WPA Does Not Adequately Protect Whistleblowers, And Enabling Agencies To Legislate Through Regulation Would Only Further Undercut The WPA's Weak Protections

As noted, the instant case is a perfect illustration of the dangers inherent in granting DHS's preferred interpretation of 5 U.S.C. § 2302(b)(8)(A). The statutory direction from Congress cited as the source for the claimed exception from WPA coverage in this case is found at 49 U.S.C. § 114(s)(1)(C), and provides that the agency is to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security ... if the Under Secretary decides that disclosing the information would ... be detrimental to the security of transportation."

Without belaboring the point, the cited language of 49 U.S.C. § 114(s)(1)(C) does not provide anywhere near the level of specificity demanded by the WPA's exemption provisions (this argument is covered at great length by Respondents. Resp't. Br. in Opp'n at 24-27). Instead, by statute, Congress granted DHS wide latitude to create regulations prohibiting the disclosure of information that it, in its sole discretion, determines to be "detrimental to" transportation security. To argue that Congress

intended to provide DHS with this broad authority, but then intended to entirely remove agency accountability by exempting *abuses of* this authority from coverage under the WPA runs counter to the purpose and history of the WPA and the 2012 amendment.

Additionally, a decision in DHS's favor would have a broader reach than just the agency. To be sure, nothing in DHS's arguments indicate that it believes this power – to effectively legislate through regulation – is limited only to DHS or to this particular implementing statute. The logic of DHS's argument could be broadly applied to other agencies or other implementing statutes, empowering agencies to carve out large swathes of exemptions from WPA coverage in a manner not contemplated by Congress. Indeed, in its briefing, the government has implied as much, arguing for an even more expansive reading of the § 2302(b)(8)(A) exception, asserting that "SSI, by its very nature, concerns security matters," as a part of its argument in favor of barring MacLean from even raising a WPA affirmative defense. Pet'r. Br. at 24.

There is little doubt that, if given additional tools to do so, agencies determined to intimidate whistleblowers would take advantage of the opportunity to enact regulatory rules that would allow them to target whistleblowers, circumventing the stated purpose of the WPA.

Indeed, even under the current regime, agencies can – and do – successfully target whistleblowers through the use of internal agency rules and through exploiting the structural limitations of the WPA's protections. In one such case, former Environmental Protection Agency nuclear security expert Richard Levernier exposed unaddressed security vulnerabilities at nuclear weapons sites, first by complaining to his supervisor. The supervisor responded by withdrawing his security clearance – effectively removing Levernier from his position. *National Security Whistleblowers In The Post-September 11th Era: Lost In A Labyrinth And Facing Subtle Retaliation, Hearing on H.R. 1317 Before the Subcomm. On National Security, Emerging Threats, And International Relations of the H. Comm. On Government Reform*, 109th Cong. 177-78 (2006) (Statement of Richard Levernier).

As required by the WPA, Levernier next approached the Office of Special Counsel alleging whistleblower retaliation for his protected disclosures. *Id.* After over five years, the OSC finally ruled in Levernier's favor, finding that his disclosures were protected under the WPA. *Id.* However, because OSC did not have the authority to review security clearance determinations, and because successful completion of Levernier's former position required a valid security clearance, his position with the agency was never reinstated, effectively ending his career. *Id.*

Cases like Levernier's demonstrate the powerful pushback that whistleblowers face in making disclosures, even under a favorable reading of the WPA's protected disclosures provision, and the ease with which agencies can undermine the purpose of the WPA's protections. Granting DHS's preferred interpretation would only further expand the ability of agencies to silence whistleblowers by providing them with a new set of regulatory tools to fall back on.

B. The Existing Classification Scheme Adequately Protects Against The Disclosure Of The Kind Of Sensitive Information Worried About By DHS

In addition to the potential abuse of regulatory rulemaking that would result if the DHS's preferred interpretation of the WPA is adopted, another reason for rejecting that interpretation is that there is simply no need for such an expansive reading of the WPA exceptions.

In addition to excluding disclosures "specifically prohibited by law" from the WPA's coverage, the Act carves out another exception for information "specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. § 2302(b)(8)(A). At the very least, this would include all information designated as "Top Secret," "Secret,"

and "Confidential" under the Executive branch's current classification system.[2]

Given that the government already extensively uses the classification system to protect against the public disclosure of sensitive information, it is entirely unnecessary to empower agencies to designate another broad category of information (SSI, in this case) as outside the scope of the WPA.

By the government's own estimates, in 2012 alone executive branch agencies made over 95 million "classification decisions"[3] – a fourfold increase from the more than 23 million classification decisions by the agencies a decade earlier in 2002.[4] Indeed, the concerns about rampant overclassification became so severe that in 2010 Congress ordered the Justice Department to conduct a comprehensive audit of the Executive branch's classification system to assess whether the stated policies and procedures were being properly followed and effectively administered and to address how the

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[2] Executive Order No. 13526 (2009) contains the most recent definitions and requirements of the current classification system.

[3] Information Security Oversight Office, The National Archives and Records Administration, "2012 Annual Report To The President," at 1. http://fas.org/sgp/isoo/2012rpt.pdf.

[4] Information Security Oversight Office, The National Archives and Records Administration, "Report To The President, 2002," at 4. http://fas.org/sgp/isoo/2012rpt.pdf.

agency should go about remedying the perpetual problem of overclassification.[5] Further, according to a 2011 ODNI report, that year there were nearly 5 million holders of active security clearance, over 1.4 million of whom held the highest level "Top Secret" clearance.[6]

Through the use of the classification system, along with the threat of felony criminal penalties for disclosing classified information,[7] the government is already able to strike an appropriate balance, adequately preventing the disclosure of the most sensitive information without further undercutting the effectiveness WPA.

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[5] REDUCING OVER–CLASSIFICATION ACT, P.L. 111-258, October 7, 2010.

[6] The Office of the Director of National Intelligence, "2011 Report on Security Clearance Determinations," at 3, Table 1, http://fas.org/sgp/othergov/intel/clear-2011.pdf.

[7] *See* 18 U.S.C. § 798.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Federal Circuit should be affirmed.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 29 2014
OFFICE OF THE CLERK

No. 13-894

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY,
Petitioner,

v.

ROBERT J. MACLEAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE UNITED STATES OFFICE OF SPECIAL COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE UNITED STATES OFFICE OF SPECIAL COUNSEL

Amicus curiae, the United States Office of Special Counsel (OSC), is an independent federal agency charged with, *inter alia*, protecting federal employees from "prohibited personnel practices" as defined in 5 U.S.C. § 2302(b). 5 U.S.C. §§ 1212-1214. One such prohibited personnel practice bars retaliation against whistleblowers—that is, employees who disclose information that they reasonably believe evidences specific types of wrongdoing, including "a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A)(ii). This protection extends to qualified disclosures except when they are "specifically prohibited by law" or Executive order. 5 U.S.C. § 2302(b)(8)(A).[1]

Congress granted OSC amicus curiae authority "to present the views of the Special Counsel with respect to compliance with section 2302(b)(8) * * * and the impact court decisions would have on the enforcement of such provision[ ] of law." 5 U.S.C. § 1212(h)(1).[2] Because this case concerns the scope of the "specifically prohibited by law" proviso in 5 U.S.C. § 2302(b)(8)(A), the outcome bears directly on OSC's enforcement of the statute. Thus, OSC offers its views for consideration. As the agency responsible for enforcing 5 U.S.C. § 2302(b)(8), OSC has special

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[1] The full text of the proviso is "if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. § 2302(b)(8)(A).

[2] The Solicitor General authorizes the filing of this brief. Likewise, on June 27, 2014, Respondent MacLean consented to the filing of amicus curiae briefs.

experience interpreting the statute. *See United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001) (explaining deference is appropriate when an agency has specialized experience construing a statute that the agency administers).

SUMMARY OF THE ARGUMENT

The key issue in this case is whether respondent's disclosure of sensitive security information (SSI), a form of controlled unclassified information, constituted a whistleblower disclosure specifically prohibited by law for purposes of 5 U.S.C § 2302(b)(8)(A). Respondent disclosed an agency decision to cancel all overnight missions for federal air marshals only days after he received a warning of potential terrorist attacks involving commercial airplanes on long-distance flights. J.A.91-94. Transportation Security Agency (TSA) regulations prohibit such disclosures of SSI. 49 C.F.R. § 1520.9.

The Federal Circuit appropriately concluded that Congress intended the narrow "specifically prohibited by law" limitation to apply only to disclosures explicitly prohibited by statute. A contrary result would frustrate a central purpose of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1116: to encourage disclosures by protecting whistleblowers from agency retaliation.

1. The CSRA's plain language and legislative history confirm that agency regulations, including the SSI regulation at issue here, are not laws for purposes of 5 U.S.C. § 2302(b)(8)(A). What is more, the Air Transportation Security Act of 1974 (ATSA), Pub. L. No. 93-366, 88 Stat.

417, as amended,[3] while unquestionably a law, does not *specifically* prohibit protected disclosures because it leaves too much uncertainty and grants too much discretion to the agency to prohibit disclosures by regulation.

2. A clear statutory purpose of the CSRA is to encourage disclosures of government misconduct and genuine threats to public safety by safeguarding whistleblowers from retaliation. Allowing agencies to prohibit whistleblower disclosures by regulation would affirmatively thwart that principal aim because it would empower agencies to circumvent the very restraints placed on them.

   a. Congress struck a careful balance in the CSRA: encouraging robust whistleblowing while protecting sensitive information. To maintain this balance, Congress has repeatedly intervened to dismantle judicially-constructed obstacles that weakened whistleblower protections and to restore its original broad intent to encourage disclosures.

      Congress was mindful, however, that legitimate reasons exist for shielding certain information from the public. To that end, Congress withheld protection in the narrow circumstances where the disclosures are

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[3] The ATSA, which originally authorized the Federal Aviation Administration to promulgate SSI regulations, was amended by the Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597, and the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2178, to transfer this regulatory authority to the TSA. For convenience, OSC refers to this authority, currently codified at 49 U.S.C. § 114(r), as the ATSA.

"specifically prohibited by law." Congress also understood that agencies require discretion to perform their missions and allocate resources. Thus, with regard to disclosures of threats to public safety, the CSRA affords agencies the freedom to make security decisions without second-guessing by only protecting disclosures that evidence *substantial* and *specific* dangers.

b. The chilling effect on whistleblowers is real. Congress enacted these protections because government officials do not always act in the best interests of the people they serve. As the Court acknowledged this past term, "[t]here is considerable value * * * in encouraging, rather than inhibiting, speech by public employees. For '[g]overnment employees are often in the best position to know what ails the agencies for which they work.'" *Lane v. Franks*, __ U.S. __, 134 S. Ct. 2369, 2377 (2014) (citation omitted). Allowing agencies to restrict whistleblowers through agency regulations will discourage employees from making potentially life-saving disclosures.

ARGUMENT

I. THE "SPECIFICALLY PROHIBITED BY LAW" PROVISO IN THE CSRA DOES NOT ENCOMPASS AGENCY REGULATIONS

Since its enactment over 35 years ago, the CSRA has been enforced in a way that protects any disclosure that otherwise meets the statutory requirements, except in the narrow circumstance where a statute or Executive order specifically prohibits the disclosure.

Until the Merit Systems Protection Board's (MSPB) decision in *MacLean v. Department of Homeland Security*, 112 M.S.P.R. 4 (2009), this interpretation had remained undisturbed for more than three decades. The Federal Circuit rightly rejected the MSPB's ruling that a regulation is a law for purposes of the "specifically prohibited by law" proviso.

Congress intentionally withheld the power from agencies to undermine whistleblower protections through regulations. *See Kent v. Gen. Servs. Admin.*, 56 M.S.P.R. 536, 542 (1993) (finding Congress clearly intended to omit regulations from the "specifically prohibited by law" proviso). Although a presumption exists that a properly promulgated, substantive regulation carries the force and effect of law, this presumption yields to a clear legislative intent that the term "law" excludes such regulations from its meaning. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-296 (1979). Here, the CSRA's plain language and legislative history evidence a clear intent that the SSI regulation is not a law for purposes of the "specifically prohibited by law" proviso.

A. The Plain Language of the CSRA Confirms That the "Specifically Prohibited by Law" Proviso Refers to Statutory Law Only

Section 2302(b)(8)(A) of title 5, United States Code, verifies that Congress intended to omit agency regulations from the phrase "specifically prohibited by law." The proviso is surrounded by seven instances of language employing the broader phrase "law, rule or regulation." *See* 5 U.S.C. §§ 2302(b)(1)(E), (6), (8)(A)(i), 8(B)(i), (9)(A), (12), (d)(5). "[W]here Congress includes particular language in one section of a statute but omits it in another * * * it is generally presumed

that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). Thus, Congress's pointed exclusion of "rule or regulation" from the proviso was intentional.

The separate prohibition for disclosures of information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs" further confirms that the proviso does not include regulations. 5 U.S.C § 2302(b)(8)(A). Executive orders rooted in the President's constitutional powers or in congressional grants of authority carry the full force and effect of law. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (explaining that the President's power to issue an Executive order "must stem either from an act of Congress or from the Constitution itself"); *Armstrong v. United States*, 80 U.S. 154, 156 (1871) (courts are bound to give effect to the President's Executive order pardoning all participants in the rebellion). If "specifically prohibited by law" encompassed legal authority beyond statutes, then Congress would not have required an additional exception for disclosures prohibited by Executive order. For this separate exclusion to have meaning, the term "law" must be limited to statutes. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, __ U.S. __, 132 S. Ct. 2065, 2071 (2012) ("[I]f possible, effect shall be given to every clause and part of a statute.") (citation omitted).

B. The Structure and Legislative History of the CSRA Reinforce Its Plain Meaning

The prohibition against retaliation for making a protected disclosure (5 U.S.C. § 2302(b)(8)) is located

in a section of the statute that restricts agencies from taking improper personnel actions. As originally drafted in the CSRA, section 2302(b) listed 11 specific prohibited personnel practices to prevent agencies from engaging in various categories of misconduct and abuse. Pub. L. No. 95-454 § 101, 92 Stat. 1116. The placement of whistleblower protections in a section designed to restrain agency action bolsters the common sense conclusion that Congress did not empower agencies to evade these protections by issuing their own regulations.

The CSRA's legislative history reinforces that Congress intended to include only statutory law. The original CSRA, as introduced in the House and Senate, provided a broader exception than appears in the statute. The earlier versions required employees to make disclosures prohibited by "law, rule or regulation" through confidential channels to qualify for protection. *See* H.R. 11280, 95th Cong. (2d Sess. 1978) ("any employee who has authority to take * * * personnel action shall not * * * take action against any employee * * * for the disclosure, *not prohibited by law, rule or regulation*, of information concerning violations of law, rules or regulations") (emphasis added); S. 2640, 95th Cong. (2d Sess. 1978). The CSRA, as enacted, however, narrowed that exception to disclosures "specifically prohibited by law." 5 U.S.C. § 2302(b)(8)(A)(ii).

Thus, Congress affirmatively removed the words "rule or regulation" from the statute. Indeed, the Senate bill even amended the proviso to "prohibited by statute." H.R. Conf. Rep. No. 95-1717, at 130 (1978); *see also* S. Rep. No. 95-1272, at 130 (1978). Although the enacted version of the CSRA did not adopt the Senate's phrasing, the House Conference Report that

reconciled the competing House and Senate provisions explained the intent: "[T]he reference to disclosures specifically prohibited by law is meant to refer to *statutory law* and court interpretations of those statutes. *It does not refer to agency rules and regulations.*" H.R. Conf. Rep. No. 95-1717, at 130 (1978) (emphasis added); *see also* S. Rep. No. 95-1272, at 130 (1978).

That Congress had intended the provision "prohibited by law" to apply only to statutes was reinforced when the legislation was amended almost a decade later by the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16. The House Committee Report accompanying the 1989 amendments reaffirmed that the "prohibited by law" proviso referred to statutory law:

> For the disclosure of information the public release of which is barred *by statute* or by executive order due to national security considerations, whistleblowers are still protected if they make the disclosure to the head of the agency, the Inspector General or the Special Counsel of the Merit Systems Protection Board.

H.R. Rep. No. 100-274, at 18 (1987) (emphasis added). *See Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (views of a Congress amending an existing law as to the intent behind the law are "entitled to significant weight").

C. The ATSA Lacks the Specificity Required to Qualify as a "Law" Under the CSRA

While the ATSA certainly is a law, it does not qualify under the CSRA's "specifically prohibited by law"

proviso because the use of the term "specifically" is assumed to carry meaning. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (explaining that statutory terms are assumed to have nonsuperfluous meaning). Nowhere in the ATSA does the statute "specifically" prohibit the disclosure of SSI. Indeed, the ATSA is at least one step removed from a specific prohibition; it only directs the head of the TSA to prescribe non-disclosure regulations following an agency determination that such disclosures would be "detrimental to the security of transportation." 49 U.S.C § 114(r). The statute does not provide criteria for this determination; rather, it leaves these decisions entirely to the discretion of the TSA. *Id.* For purposes of the CSRA, this discretion undermines the goal of preventing agencies from stifling or discouraging whistleblowers. In short, if the discretionary grant in the ATSA suffices for a specific prohibition, then any statute authorizing an agency to adopt non-disclosure regulations would qualify, leaving the door open for agencies to sidestep whistleblower protections by regulation.

If Congress had wanted the SSI regulations to preempt whistleblower disclosures under 5 U.S.C. § 2302(b)(8)(A), it could have done so. It did not. By contrast, the ATSA does permit the SSI regulations to supersede the public disclosure requirements of the Freedom of Information Act (FOIA). *Id.* Congress's silence with respect to section 2302(b)(8)(A) further militates against the ATSA qualifying as a "law" that specifically prohibits whistleblower disclosures.

II. REVERSAL WOULD FRUSTRATE THE CLEAR STATUTORY PURPOSE TO ENCOURAGE DISCLOSURES AND RESTRAIN AGENCIES

A reversal of the Federal Circuit's decision seriously threatens OSC's ability to enforce the CSRA's whistleblower protections and deter agencies from retaliating against employees who make disclosures. *See Marano v. Dep't of Justice*, 2 F.3d 1137, 1142 (Fed. Cir. 1993) ("As long as employees fear being subjected to adverse actions for having disclosed improper governmental practices, an obvious disincentive exists to discourage such disclosures. A principal office of the WPA is to eliminate that disincentive and freely encourage employees to disclose that which is wrong with our government."). Accordingly, the Court should reject a construction of the CSRA that is "inconsistent with the statutory mandate or that frustrate[s] the policy that Congress sought to implement." *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

A. The CSRA, Including Its Amendments, Represents a Careful Balance Of Encouraging Robust Whistleblowing While Protecting Sensitive Information

Although petitioner raises concerns about national security, a reversal is unnecessary to protect those interests. The CSRA reflects a considered decision by Congress to balance agencies' needs while creating space for robust whistleblowing that enhances the nation's security. A reversal will upset this balance by weakening whistleblower protections and empowering agencies—the very entities from which Congress intended to protect employees—to promulgate

regulations that chill disclosures of substantial and specific threats to public safety.

1. Congress has Intervened When Necessary to Ensure the CSRA Encourages Robust Whistleblowing and Prevents Agency Retaliation

Since the passage of the CSRA, Congress has acted on multiple occasions to reaffirm its intent to encourage disclosures and prevent agency retaliation. To that end, Congress has rejected constrictive judicial interpretations and strengthened the statute's protections to foster a more favorable environment for whistleblowers. This history confirms that Congress intended to encourage disclosures and make protections robust.

In amending the CSRA, a central concern was dismantling judicial decisions that had unduly narrowed whistleblower protections. For example, Congress was disturbed by court decisions that evaluated a whistleblower's motive before deciding whether a disclosure deserved protection. S. Rep. No. 100-413, at 13 (1988) (criticizing *Fiorillo v. Dep't of Justice*, 795 F.2d 1544 (Fed. Cir. 1986), *superseded by statute*, WPA, Pub. L. No. 101-12, 103 Stat. 16, for considering an employee's motives "despite the lack of any indication in the CSRA that [motives were] supposed to be considered in determining whether a disclosure is protected"). To correct this error, Congress amended the statute to clarify that "a disclosure" meant "any disclosure." WPA, Pub. L. No. 101-12 § 4(a)(5), 103 Stat. 16 (1989).

In 1994, while reauthorizing OSC, Congress criticized judicial decisions that "represented a steady attack on achieving the legislative mandate for

effective whistleblower protection." H.R. Rep. No. 103-769, at 16-18 n.15 (1994) (referencing restrictive interpretations in ten MSPB and four Federal Circuit decisions). In so doing, the House Report emphasized that the *only* permissible restrictions on protected disclosures were for classified information (which SSI is not) or disclosures "specifically prohibited by *statute*." *Id.* at 18 (emphasis added).

Most recently, in the Whistleblower Protection Enhancement Act (WPEA) of 2012, Congress overturned Federal Circuit decisions that withheld protection for disclosures made to the wrongdoer (*Horton v. Dep't of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996)); disclosures made in the performance of an employee's duties (*Willis v. Dep't of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998)); and disclosures of information that were already known (*Meuwissen v. Dep't of Interior*, 234 F.3d 9, 12-13 (Fed. Cir. 2000)). *See* Pub. L. No. 112-199 § 101(b)(2)(C), 126 Stat. 1465-76; 5 U.S.C. § 2302(f).

In addition to correcting limiting and counter-textual judicial decisions, Congress's amendments have sought to encourage disclosures by making it easier for whistleblowers to win retaliation cases. The WPA lightened the burden in proving a prima facie case of retaliation by requiring only that the disclosure be a "contributing factor" in a retaliatory personnel action. WPA, Pub. L. No. 101-12 § 3, 103 Stat. 16 (amendments adding 5 U.S.C. § 1214(b)(4)(B)(i) and 5 U.S.C. § 1221(e)(1)). Conversely, the WPA placed a heavier evidentiary burden on the employer to defend itself, requiring clear and convincing evidence to overcome a prima facie case. *Id.* (adding 5 U.S.C. § 1214(b)(4)(B)(ii)). Congress also created a new legal

presumption, enabling an employee to prove a causal nexus between a whistleblowing disclosure and a retaliatory action by merely demonstrating that a responsible agency official knew of the disclosure and that "the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action." An Act to Reauthorize The Office of Special Counsel, And For Other Purposes, Pub. L. No. 103-424 § 4, 108 Stat. 4361 (amending 5 U.S.C. § 1221 (e)(1)).

In short, the history of whistleblower legislation, from the CSRA through the WPEA, reflects Congress's resolve to protect its plain directive from overly narrow interpretations and to strengthen the statute to better realize its underlying purpose.

2. The CSRA Contains Sufficient Safeguards to Protect Sensitive Information

Congress constructed safeguards within the CSRA to protect against *security-degrading* disclosures on national security matters, while at the same time encouraging *security-enhancing* disclosures.

First and foremost, if the information is classified or prohibited from disclosure by statute, then the employee must make the disclosure through the prescribed procedures identified in 5 U.S.C. § 2302(b)(8)(B). Thus, if Congress disagrees with the Federal Circuit's conclusion regarding SSI, the CSRA provides a solution: Congress could either: (1) amend the ATSA to specify that SSI regulations issued under the statute trump the protections for whistleblower disclosures, as Congress did in specifying that SSI regulations trump the protections for disclosures

under FOIA; or (2) specifically prohibit SSI material from disclosure.

For his part, the President could prohibit whistleblower disclosures of SSI material by Executive order if he were to determine that this was necessary for national security. Notably, the President has done the opposite. The President has issued an Executive order regulating disclosures of SSI that favors whistleblowing and transparency. That order provides that the mere designation of information as "controlled unclassified information" (CUI), which includes SSI, will not insulate the information from disclosure under "any" applicable law. Exec. Order No. 13556 § 2(b), 75 Fed. Reg. 68675 (Nov. 4, 2010) ("The mere fact that information is designated as CUI shall not have a bearing on determinations pursuant to any law requiring the disclosure of information or permitting disclosure as a matter of discretion * * *").

Second, in all other circumstances, including where the information is sensitive but unclassified, an employee may make a security-enhancing disclosure, but only when the danger disclosed is both substantial and specific, not speculative and distant. The "substantial and specific" standard in 5 U.S.C. § 2302(b)(8)(A)(ii) reflects a balance that Congress struck between the government's need to conduct its business and the public's need to learn of information concerning threats to public health or safety, when such information is unclassified and not specifically prohibited from disclosure by statute. The CSRA achieves this balance by withholding protection from disclosures of only speculative or theoretical dangers, and extending protection in those circumstances where the public is most at risk and, therefore, most

likely to benefit from an immediate public warning. *See, e.g.*, *Chambers v. Dep't of Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008) (*Chambers I*) (explaining, "revelation of a negligible, remote, or ill-defined peril that does not involve any particular person, place, or thing, is not protected") (citation omitted).

The rigorous standard for protected disclosures is clear from the Federal Circuit's decision in *Chambers v. Department of Interior*, 602 F.3d 1370 (Fed. Cir. 2010) (*Chambers II*) and the MSPB decision that followed. In *Chambers II*, the chief of the National Park Service Police challenged her removal from service as retaliation for disclosures that she had made to a newspaper and a congressional staffer concerning the detrimental effect of budgetary cuts on the Park Police's ability to protect monuments and park visitors in the Washington, D.C. area. *Id.* at 1373-74.

The Federal Circuit found one of the employee's disclosures concerning the inadequate deployment of officers on the Baltimore-Washington Parkway to be protected. *Id.* at 1379. The court analyzed several factors, including: (1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm. *Id.* at 1376. The Federal Circuit concluded that the employee's disclosure was protected because: (1) traffic accidents constituted a threat to public health and safety; (2) the disclosure did not describe a speculative harm but rather a specific consequence—increased accidents—because such accidents had *already* happened; and (3) the disclosure contained the specific cause of the increased danger. *Id.* at 1379.

On remand, the MSPB distinguished the employee's disclosures that satisfied the substantial and specific

danger requirement from her disclosures that did not. *Chambers v. Dep't of Interior*, 116 M.S.P.R. 17, ¶¶19-24 (2011) (*Chambers III*). The MSPB protected disclosures that specifically linked personnel reductions to adverse consequences (*i.e.*, traffic accidents and drug-dealing in National Parks). *Id.* at ¶24. By contrast, the MSPB held that the employee's nonspecific disclosures that low staffing at the national monuments had placed those monuments and human life in jeopardy were too vague to constitute a substantial and specific danger to public safety under the statute. *Id.* at ¶23.

Here, *Chambers II* and *III* provide a framework for evaluating respondent's disclosure of a danger to public safety under the "substantial and specific" clause in the specific context of budgetary allocations. Under the *Chambers* framework, the MSPB would hear evidence and develop a full record on the seriousness of the danger that respondent disclosed and the likelihood of harm. Specifically, the key issue would be whether the agency's resource allocation decision to restrict coverage from overnight missions created a substantial and specific danger to public safety beyond the ordinary risk attendant to the fact that not all flights have a marshal.

B. Empowering Agencies to Avoid the CSRA Will Chill Whistleblowers

A reversal of the Federal Circuit's decision risks chilling whistleblowers from coming forward and would undermine OSC's mandate to prevent and address whistleblower retaliation by agencies. As a general matter, when judicial decisions whittle away at the protections afforded to whistleblowers, a concomitant chilling effect occurs. A case in point is the Federal Circuit's decision in *Hesse v. Department*

of State, 217 F.3d 1372, 1377-80 (Fed. Cir. 2000), *cert. denied,* 531 U.S. 1154 (2001). In *Hesse*, the Federal Circuit extended the Court's ruling in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), to preclude OSC and MSPB jurisdiction over the merits of a whistleblower retaliation claim where the challenged adverse action results from an agency determination that an employee is ineligible to hold a security clearance. *Id.* The *Hesse* decision has resulted in OSC having to turn away countless complainants who allege retaliation for whistleblowing where the challenged personnel action (*i.e.*, removal) results from a security clearance revocation, which itself could be retaliatory.

While it is impossible to calculate how many potential whistleblowers have refrained from bringing wrongdoing to light because of *Hesse*, it stands to reason that employees who hold security clearances will not come forward to report government misconduct, knowing that they could suffer retaliation and lose their livelihoods without any external recourse to challenge their removal.

Here, the danger is similar. A reversal will insulate from outside review any retaliatory personnel actions taken against employees who make disclosures in violation of an agency regulation. This, in turn, will discourage employees, who may be in the best position to protect the public from imminent threats to safety, from disclosing these dangers for fear of losing their jobs.

The chilling effect is mitigated somewhat by section 2302(b)(8)(B), which does create confidential channels —an agency's Inspector General and OSC—for employees to bring information that is prohibited from public disclosure by law or Executive order.

Nonetheless, those channels are a less expeditious means of addressing the risks of harm presented by a substantial and specific danger to public health and safety. As this case shows, the respondent's disclosure to the media elicited an immediate agency response, whereas his disclosure to management and the Inspector General prompted none. J.A.71, 96-98. Although respondent could also have made his disclosure to OSC, OSC's only recourse would have been to send the disclosure back to the agency for investigation—OSC has no independent authority to investigate the underlying disclosure.[4] 5 U.S.C. § 1213. With good reason, Congress requires the use of this more cumbersome channel only in circumstances where Congress or the President specifically prohibits a public disclosure.

Of grave concern to OSC is that agencies could abuse their regulatory power to over-designate the information that is to be prohibited from disclosure as a means of suppressing a broad swath of information and stifling whistleblowers. Likewise, agencies may selectively enforce such broad regulations to punish and deter whistleblowing. This danger is not far-fetched. After all, whistleblower protection laws exist because government officials do not always act in the nation's best interests. In light of Congress's central goal to encourage disclosures and restrain agencies, it is doubtful that Congress would vest agencies with the power to eliminate the very restraint it placed on agencies' own actions.

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[4] OSC's authority to receive whistleblower disclosures and refer them to agencies for investigation is distinct from its authority to investigate claims of retaliation against employees who make disclosures. *Compare* 5 U.S.C. § 1213 *with* 5 U.S.C. § 1214.

Such agency overreach is not uncommon in OSC's experience. For example, agencies have misused nondisclosure policies in employee handbooks, confidentiality provisions in settlement agreements, and other policies as a basis for punishing employees who make disclosures. Indeed, this problem prompted Congress to add a new prohibited personnel practice in the WPEA that requires agencies to cross-reference whistleblower protections, among other laws, whenever inserting nondisclosure provisions into a policy, form, or agreement. 5 U.S.C. § 2302(b)(13). This new prohibited personnel practice ensures that employees are on notice that these agency nondisclosure policies do not supersede or infringe the employees' rights under the whistleblower laws, so that they will not be deterred from making disclosures. *Id.*

OSC does not suggest that the TSA overreached in its designation of SSI here. Nonetheless, the general chilling effect of agency regulations is exacerbated by the extraordinary fact that it took petitioner three years to issue a final order that the information respondent disclosed was SSI. *See MacLean v. Dep't of Homeland Sec.*, 543 F.3d 1145, 1149 (9th Cir. 2008). If the Court reverses, potential whistleblowers will have to weigh whether their agency might one day retroactively determine that the information they disclosed is SSI, thereby exposing them to discipline. Moreover, in fear that such retroactive designations are possible, whistleblowers may refrain from alerting the public to dangers that could have been averted or mitigated. This result is plainly contrary to the CSRA's purpose and would be a dire consequence Congress never intended.

The Senate Committee on Governmental Affairs framed the risk succinctly: "Often, the Whistle Blower's reward for dedication to the highest moral principles is harassment and abuse. Whistle Blowers frequently encounter severe damage to their careers and substantial economic loss." S. Rep. No. 95-969, at 8 (1978). When such harassment and damage ensues, it almost invariably comes at the hands of the whistleblower's own agency. Given that reality, it is all the more implausible that Congress intended to vest agencies with the power to regulate around whistleblower protections.

CONCLUSION

For the foregoing reasons, OSC respectfully requests that the Court affirm the Federal Circuit's decision.

Respectfully submitted,

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